92-2048

No. _____

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Supreme Court, U.S.
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IN THE
Supreme Court Of The United States
October Term 1992

PAT S. HOLLOWAY, ROBBIE HOLLOWAY, AND
FLOJO TRADING CORPORATION,
Petitioners,
v.

JANE H. BROWNING, MICHAEL G. STARNES, ET AL.,
Respondents.

On Petition For Writ Of Certiorari
To the Court of Appeals
For the Fifth Judicial District
of Texas at Dallas

JOINT PETITION OF PAT S. HOLLOWAY AND ROBBIE HOLLOWAY FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause of the 14th Amendment void a state court judgment when the uncontroverted summary judgment record establishes that the trial judge obtained a direct financial benefit of more than $100,000.00 from his judgment, was patently biased, conspired throughout the trial with the prevailing plaintiffs and their attorneys, and that his judgment was the product of what the Fifth Circuit has characterized as a "corrupt abuse of the judicial process" and a "fraud on the court"?

2. When a federal judgment dismissed all of Petitioner's pendent state law claims expressly "without prejudice" to the refiling thereof in the Texas courts on the grounds that they "should be heard in the state courts" and that "an adequate state court forum is available", can the Texas courts then determine, consistent with the Supremacy Clause, and the federal law of res judicata, that such federal judgment has barred all of the refiled state claims?

3. When the federal district court *abstains* "in favor of the Courts of the State of Texas" from deciding any of Petitioners' federal or state constitutional claims, ruling specifically that "no state court remedies ... have been foreclosed by this Court", can the Texas courts then determine, consistent with the Supremacy Clause, and the federal law of res judicata, that the federal court has foreclosed and barred all of such claims?

LIST OF PARTIES, AND AFFILIATED CORPORTIONS, IN THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS/PLAINTIFFS IN THE TRIAL COURT

Pat S. Holloway
Robbie Holloway
Flojo Trading Corporation
Humble Exploration Company, Inc. (now HECI Exploration Co.)
Sterling Pipeline Company

APPELLEES/DEFENDANTS IN THE TRIAL COURT

Jane H. Browning, individually and as co-executrix and co-trustee of the estate of William W. Browning, Jr., deceased
Michael G. Starnes, individually and as co-executor and co-trustee of the estate of William W. Browning Jr., deceased, and as co-trustee of the Browning Childrens Trust.
William W. Browning, III
Kathryn Browning
Averille Browning
Fallon Browning
Robert Browning
Browning Oil Company

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JOINT PETITION OF PAT S. HOLLOWAY AND ROBBIE HOLLOWAY FOR WRIT OF CERTIORARI

Petitioners Pat S. Holloway and Robbie Holloway respectfully pray for a writ of certiorari to the Court of Appeals for the Fifth Judicial District of Texas at Dallas.

OPINION BELOW AND STATEMENT OF JURISDICTION

The judgment of the Dallas Court of Appeals was entered, and its opinion filed, on June 30, 1992; the opinion is reported in 840 S.W.2d 14, and is reprinted in the Appendix at page 1a. Motions for rehearing in the Court of Appeals were denied on August 27, 1992 (Appendix, p.24a).

Applications for Writ of Error to the Supreme Court of Texas were denied on February 10, 1993 (Appendix, p. 25a) and Motions for Rehearing in the Supreme Court of Texas were overruled on March 24, 1993 (Appendix, p. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

ARTICLE VI, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENTS, ARTICLE XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following the unprecedented dismissal of their properly filed state court appeals,[1] Petitioners Pat S. Holloway ("Holloway") and his former wife Robbie Holloway ("Robbie") (collectively the "Holloways") brought this combined equitable bill of review and collateral attack in the state district court in Dallas to set aside a judgment by former Dallas District Judge Dee Brown Walker (the "Walker Judgment") in the prior case of *Jane H. Browning, et al. v. Pat S. Holloway, et al.* (the "Browning Case"). In *Holloway v Fifth Court of Appeals at Dallas*, 767 S.W.2d 680, 683 (Tex. 1989), the Supreme Court of Texas recognized the Holloways' right to maintain the present action notwithstanding the dismissal of their appeals, ruling that such dismissal was not a judgment "on the merits" such as is required for res judicata to apply.

Both in their petition in the present case and in their first motion for summary judgment, the Holloways asserted that the Walker Judgment was void under the due process clauses of both the United States Constitution and the Texas Constitution because of the financial interest and bias of Judge Walker.

In the original Browning Case the Respondents here, the Brownings, had sued the Holloways and Holloway's companies, Humble Exploration Company, Inc.("Humble") and Sterling Pipeline Company ("Sterling") for damages and

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[1] *Humble Exploration Company, Inc. v. Browning*, 677 S.W.2d 111 (Tex.App.--Dallas 1984), *dism'l reinstated* 690 S.W.2d 321 (Tex.App.---Dallas 1985, writ ref'd n.r.e.) (en banc), *cert. denied* 574 U.S. 1065 (1986).

constructive trust based on fraud and breach of fiduciary duty. After the Brownings sought a receivership, the Holloways and Humble filed for bankruptcy, and removed that case to the bankruptcy court.

There the parties entered into a Stipulation and Agreement which was incorporated in three agreed, final federal judgments and orders. These provided for the remand of the Browning Case to the state court upon the conditions and agreements that (1) the Browning Case would be tried before a retired or visiting state court judge, (2) "pending the trial" the Brownings would seek no receiverships, (3) "full rights of appeal" would be "preserved" to both sides, and (4) "no execution" would issue on any judgment, which would be enforced "only in the bankruptcy court." (The Brownings subsequently dishonored all these provisions of the Stipulation and Agreement and agreed federal judgments. The Brownings did not try their case before a retired or visiting judge, "pending the trial" they obtained a series of five (5) illegal receiverships, they obtained the dismissal of the defendants' appeal, and they obtained an "order for immediate execution" of their judgment which forced Petitioners into Chapter 7 bankruptcy.)

Following remand, the Browning Case was tried by active local Dallas Judge Walker over the strenuous objections of the defendants. These included a contested hearing before the local presiding administrative judge who, ruled that Judge Walker could not hear the case (which Judge Walker "overruled"), and an attempted mandamus proceeding against Judge Walker filed by the defendants in the Supreme Court of Texas (which it declined to entertain).

Judge Walker tried the Browning Case within a series of receivership proceedings he imposed on the defendants in

violation, not only of the federal Stipulation and Agreement and agreed federal judgments, but also of Texas law.[2]

At the conclusion of trial, Judge Walker entered judgment *non obstante veredicto* against the defendants. He imposed constructive trusts over all their assets, including the Holloways' residence in Dallas, their farm and home near Giddings, Texas, all of Holloway's inherited family property, and all of Robbie's separate property acquired subsequent to her divorce from Holloway.

Holloway's first and sixth motions for summary judgment in the present case, which Robbie adopted and urged, include (1) 10 supporting affidavits stating facts which clearly disqualified Judge Walker under the Due Process Clause; (2) portions of a federal deposition of Judge Walker containing admissions which disqualified him; (3) a verified and undisputed court reporter's transcription of a "confidential" agreement between Judge Walker and Jane Browning *et al.*; (4) a verified and undisputed court reporter's transcription of another *ex parte* meeting between Judge Walker and the Brownings' attorneys in which they plotted how to maintain their control over the defendant Humble in defiance of two successive opinions and orders of the appellate court; (5) a written argument by Judge Walker himself on behalf of the Brownings' position which he admitted he personally wrote and filed in the court of appeals, wherein he refers to his "personal rights" in the case; and (6) the entire trial

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[2] *Humble Exploration Company, Inc. v. Fairway Land Company*, 641 S.W.2d 934 (Tex.App.--Dallas 1982, writ ref'd n.r.e.); *Humble Exploration Company, Inc. v. Hon. Dee Brown Walker*, 641 S.W.2d 941 (Tex.App.--Dallas 1982, no writ).

record in the Browning Case and the Fairway Receivership proceeding within which the Browning Case was actually tried.

The Brownings have never filed, either in the present case or in any of the other federal and state proceedings in which the same summary judgment affidavits have been filed, any controverting affidavits, either by any of them or by any of their attorneys, controverting or denying any of the facts in any of the Holloways' 10 summary judgment affidavits which are set forth below and in the separate petition filed in this cause by Flojo Trading Corporation.

Instead, the Brownings have filed in this case and in other proceedings only a self-serving, evasive, argumentative, conclusory affidavit by former Judge Walker himself. It does not controvert any of the specific facts set forth below in this petition. Petitioners rely on the following uncontroverted facts, and those set forth in the separate petition filed in this cause by Flojo Trading Corporation, to establish the financial interest and bias of Judge Walker which render the Walker Judgment void under the Due Process Clause.

1. *Judge Walker Unlawfully Took Nearly $100,000.00 Out Of Holloway's Company Humble And Paid It To His Personal Lawyers And Accountant Then Working For Him Without Further Compensation In Other, Unrelated Matters.*

During the unlawful receivership proceedings[3] within which the Brownings were trying their claims against

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[3]*See* n.2 *supra*.

Humble, Sterling and the Holloways, Judge Walker took more than $98,000.00 out of Humble and paid it to his personal lawyers John Wright and Whitley Sessions, and to his personal accountant J. R. Hurt. *1982 Tr. VIII:1229; IX: 1257 and 1385; XII:1961; XVI:2411; XVII: 548; XVII:2583; XVIII: 2601, 2608, 2634 and 2644.*

All three of these individuals were then working for Judge Walker in other, unrelated matters. They received no other payment for their work on such matters for Judge Walker personally beyond the payments he made to them out of the defendant Humble through the mechanism of his unlawful receiverships over that company. *Tr. III:535-44, 548-9, 592, 620.*

These individuals performed no services for the benefit of Humble to justify the payments Judge Walker made to them out of it. Instead, they worked on behalf of the Brownings (*Tr. II:456-7 and 471-2*), and testified **for** the Brownings **and** Judge Walker **against** Humble and the other defendants.

Thus, Judge Walker's personal accountant J. R. Hurt testified to the jury for the Brownings, but as Judge Walker's own expert witness against the Humble=Holloway defendants. Judge Walker designated Hurt as his own expert witness against the defendants when they pointed out to him that the Brownings had failed to designate Hurt as one of their expert witnesses as required by the rules; and Judge Walker repeatedly advised the jury that Hurt was Judge Walker's own expert witness, testifying on behalf of the Brownings *and him* against the defendants. *1982 S.F. 2077* and *2134.*

At the time of trial of the Browning Case, Judge Walker was being personally represented without compensa-

tion (other than payments from Humble) in at least two other legal matters by (1) G. H. Kelsoe of Kelsoe & Ayres, the Brownings' attorneys, (2) John Wright, appointed by Judge Walker as the Brownings' receiver over Humble and the Holloways, and (3) Whitley Sessions, appointed by Judge Walker as the attorney for the Brownings' receiver.

One of these legal matters was the ongoing sexual harassment proceedings brought against Judge Walker by Sheila Porter, the librarian of the Dallas County Law Library whom Walker had discharged. Judge Walker had been Chairman of the Library Committee; Whitley Sessions had been its Vice-Chairman; and G.H. Kelsoe and John Wright were members of the Committee. *Tr. III:533-4.* Sheila Porter charged that Committee Vice-Chairman Sessions had complained to her that "the Judge [Walker] was accustomed to making library decisions wrapped in the arms of the librarian, and he was dissatisfied because he didn't get to do that." *Tr. III:547.* Kelsoe, Wright and Sessions were all representing Judge Walker in the Sheila Porter matter without payment of any kind. *Tr.III:535-44, 548, 549.* "It's all free for love," said Judge Walker. *Tr.III:548.* This matter continued through the trial of the Browning Case, until the following year. *Walker Dep. at 63.*

Another then ongoing legal matter involving Judge Walker, Kelsoe and Wright was the *Williams* case. That was a personal foray by Judge Walker to (1) punish other Dallas trial judges by re-allocating their court quarters, (2) enjoin the Dallas Court of Appeals from enlarging its quarters, and (3) deprive the Dallas Bar Association, which had held the first hearing in the Sheila Porter matter, of its recently-asserted control over the large county law library funds previously controlled by Judge Walkers and his cronies involved with him in the Browning Case.

Judge Walker recessed the jury in the Browning Case in order to allow "my lawyer" Kelsoe to argue before the Eastland Court of Appeals in support of Judge Walker's orders in the *Williams* case. *Tr.II:474, ¶ 16.* As shown by the reported appellate opinions, both Kelsoe and Wright argued unsuccessfully, in both the court of appeals and in the Supreme Court of Texas, to uphold Judge Walker in that lawsuit. See *County Commissioners' Court of Dallas County v. Williams*, 638 S.W.2d 218,220 (Tex.App.--Eastland 1982, writ ref'd n.r.e. 655 S.W.2d 206 (Tex. 1983). Judge Walker admitted he never paid either Kelsoe or Wright for any of their legal services, either in this case or to defend him personally in any of the other federal and state lawsuits in which they had represented Judge Walker personally. *Tr.III:592, 548.*

At the time of trial of the Browning Case, J. R. Hurt was and had been for a number of years Judge Walker's personal accountant, preparing his personal income tax returns and performing other accounting services for Judge Walker, always without any payment by Judge Walker. *Tr. III:620.*

So, Judge Walker appointed Hurt as his Receiver's accountant in the unlawful Humble receiverships, and paid him substantial sums out of Humble by *ex parte* orders. Then Judge Walker refused to vacate these payment orders even after being ordered to do so three times by the court of appeals. Hurt rendered no services whatever for the benefit of Humble. *Tr. II:471-3.* Instead, Judge Walker, in the presence of the jury, repeatedly designated Hurt as his own expert witness to testify for him and the Brownings against the Humble-Holloway defendants. *1982 S.F. 2077 and 2134.*

The defendants, while not allowed to present any expert witnesses of their own, were thus required to pay for the expert witness whom Walker designated as his own expert to testify for him and the Brownings against the defendants.

2. *Judge Walker Privately Hired His Own Personal Lawyer To Represent Him Against the Defendants In The Browning Case, Then Paid Such Personal Lawyer Out Of The Funds Of The Defendant Humble, Holloway's Company, On The Same Day He Transferred Humble From Holloway To The Brownings By His Judgment.*

Judge Walker privately hired, as his own personal lawyer in the Browning Case, former Dallas District Judge Robert H. Hughes. *Uncontroverted Affidavit of Judge Robert H. Hughes, Tr. II:446.*

Then Judge Walker discharged his personal obligation to his personal attorney Hughes for his services by paying him, not out of his own personal funds, but instead out of the funds of the defendant Humble. Judge Walker did this by *ex parte* order on the very same day he entered his first judgment *n.o.v.* stripping Holloway of his ownership of Humble. *Tr.II:447 ¶ 6; 1982 Tr.IX:1379 and X:1421.*

Judge Walker, by entry of such judgment, thereby protected himself personally from any reimbursement liability for discharging his personal obligation to his own attorney out of the funds of the defendant Humble through his unlawful receivership over it, all by payment orders in a receivership which had already twice been ordered to be vacated by the appellate court.

In Judge Walker's affidavit filed in the present case, he admits he hired Judge Hughes, and he admits he paid him his fees out of Humble's funds. *Tr.III:675*. He does not even claim that there was any statute, or court rule, or case law, or motion, or hearing, or court order authorizing him to hire Judge Hughes which could lend even any color to the Brownings' argument that Judge Walker must have been acting in some official judicial capacity, rather than in his personal capacity, when he privately hired Judge Hughes to represent him as his personal lawyer against the defendants in the Browning Case.

3. *In Mid-Trial Judge Walker By Ex Parte Order Deprived The Defendants Of Their Attorneys, Their Accountants, All Their Trial Files, All Their Evidence Files, All Their Other Documentary Evidence, Their Business Records And Their Fact Witnesses.*

Just as the Humble-Holloway defendants were about to commence the presentation of their side of the case to the jury, Judge Walker entered an *ex parte* order which deprived them of their only lawyers familiar with the case, all their legal trial files, all their lawyers' evidence files, all their other documentary evidence, all their accountants, all their business records and their fact witnesses, the remaining Humble employees. The entirely uncontroverted affidavit of William J. Albright, Humble's Assistant General Counsel, includes the following:

> 13. On or about July 27, 1982, I was summoned by Whitley Sessions or some other representative of Wright to appear at the courthouse under the pretense that a status meeting had been called by Wright to discuss ongoing Humble business . . . Upon my arrival I searched for, but was unable to locate Wright. Instead, I was instructed to wait in the hall

> outside Walker's courtroom. Shortly thereafter, I was served with a copy of an order signed by Walker. Under the terms of the order, [General Counsel] Ashworth, [C.P.A.-Comptroller] Holt, Holloway, [C.P.A.-Attorney] Swank, [C.P.A.] Lovett and I were suspended from employment at Humble without pay and were restrained and enjoined from entering the office of Humble. The entry of this order, which was without notice or a hearing, closely coincided with the completion of the Brownings' case-in-chief and the commencement of Humble's defense. It operated to prevent [General Counsel] Ashworth and me from gaining access to our litigation files located at the Humble office, including specifically those described above in which I had compiled the evidentiary support for defenses to the BCT Trust Opportunity claim. The order further operated to prevent Ashworth and me from having the opportunity to review Humble records and to confer with knowledgeable Humble employees concerning the contents of such records, which were needed for the defense of the claims raised by the Brownings. The order further operated to prevent Ashworth and me from having the opportunity to present such records to Holloway and to confer with him as to the contents of such records. During the presentation of Humble's defense, neither Ashworth nor I were able to reconstruct the information set forth in such files. As a result of this order, much of the information which was critical to Humble's defense was not presented at trial, and does not appear in the record of such proceedings.

Tr.II:457-8; see also id. at 473, ¶ 14. Then Judge Walker refused to give any explanation or justification for his *ex parte* order. He would not even allow Humble's entirely

unprepared trial counsel (*Tr.II:470*) to question Receiver Wright or his attorney Sessions about the reasons or grounds for the *ex parte* order. Counseled by Judge Walker, both refused to answer any questions. *Tr.I;104-6; see also Tr. II;471, ¶10.*

4. *Judge Walker Refused To Allow The Defendants To Present Any Expert Witnesses But He Allowed All Expert Testimony Offered By The Brownings, And He Designated His Own Expert Witness To Testify For Him And The Brownings Against The Defendants.*

After capturing the Browning Case which had been set for trial 4 months later before a retired judge in accordance with the federal Stipulation and Agreement, Judge Walker set it for trial in his own court on only *12* days' advance notice to the defendants. *1982 Tr. 1092.* Then he refused to allow the defendants to present any expert witnesses, on the ground that they had failed to give the required *14* days' notice thereof prior to trial, a physical impossibility under the circumstances. *1982 S.F. 3006, 3010, 3311, 2602-4.* But then Judge Walker waived the 14-day notice requirement for the Brownings to allow two undisclosed and undeposed witnesses to testify as experts for the Brownings, Felix McKnight and Judge Walker's personal accountant J. R. Hurt. *See 1982 Tr. 26, 50, 63 and 81* (Brownings' list of experts did not include McKnight or Hurt). Hurt testified as Judge Walker's own expert (1982 S.F. 2077 and 2134) for the Brownings and him against the defendants at interminable length, (*1982 S.F. 2062-2719*), as did McKnight. *1982 S. F. 807 et seq.*

5. *Having Deprived the Defendants of their Expert Witnesses, Fact Witnesses, Attorneys, Trial Files, Documentary Evidence, Accountants and Business Records, Judge Walker Then Allowed The Brownings*

To Continue To Conceal Their Own Records And Evidence Which Would Have Disproved Their Claims.

At trial Judge Walker refused to require the Brownings to produce as demanded the accounting or financial records of the $30,000 Browning Childrens' Trusts (the "BCT"). *1982 S.F. 644-6*. The Brownings had alleged that Holloway was a "thief" and had "embezzled" from the BCT. *Tr. II:326*. Yet Judge Walker allowed the Brownings to continue to conceal the financial and accounting records that would have disproved such charges. In the 14 years since this litigation commenced the Brownings have never produced any audit of their own $30,000 BCT from which they claim Holloway stole and embezzled. Nor have they ever allowed Holloway to conduct an independent audit. There still never has been any audit by anyone.

The Brownings did not deny or controvert any of the following assertions in the court below by Robbie, who was Holloway's bookkeeper and secretary, as well as wife, during the time period involved: (1) that Holloway never in fact stole or embezzled anything from the BCT; (2) that he never even took one penny of trustee's fees, attorney's fees or any other compensation from the BCT; (3) that he was never even reimbursed for all of his out-of-pocket expenditures on behalf of the BCT; (4) that the leases he bought for the BCT for less than Thirty Thousand Dollars ($30,000.00) have actually produced oil and gas revenues of more than Thirty Million Dollars ($30,000,000.00); and (5) that Holloway's company Humble was never repaid any of the advances it made to the BCT at Holloway's direction when Jane Browning, after Bill Browning's death, refused to make any additional contribution to the BCT vitally needed to complete the purchase of the oil and gas lease block which

so greatly enriched the already-rich Browning "Children" (even before they obtained all the spoils of the Walker Judgment).

6. *G. H. Kelsoe, The Brownings' Lawyer, Was Judge Walker's Business Associate At The Time Of Trial, And Had Represented Him Free Of Charge In A Federal Lawsuit*

At the time of the Browning Case Judge Walker, Kelsoe and Wright maintained joint financial control, by Judge Walker's co-signature with either Kelsoe or Wright on the checking account, over the funds of their organization described in the next section. *Tr.III:558-9.* Judge Walker and Kelsoe had also jointly incorporated a cemetery association, the articles of incorporation of which were prepared by Kelsoe from a form supplied by Judge Walker. *Tr.III:601.*

Judge Walker admitted that Kelsoe had been his personal friend, personal attorney, and campaign manager since 1956 *(Tr.III:525)*, and had represented him free of charge in a federal lawsuit brought against him. *Tr. III:591.*

7. *At The Time Of Trial Of The Browning Case Judge Walker Had An Ongoing Financial And Professional Association With Kelsoe & Ayres, John Wright, Whitley Sessions, and J.R. Hurt.*

Judge Walker admitted that after he and his cronies involved in the Browning Case lost control of the Library Committee and all its large funds, he, G.H. Kelsoe, Kelsoe's son Robert L. Kelsoe, Ayres, Wright, Sessions and Hurt had then organized the "Dallas *County* Bar Association" (not to be confused with the long-established Dallas Bar Association). The idea for the new "bar association" originated at

a meeting of Judge Walker's Law Library Committee in November, 1980, *(Tr.III:552)*, a month before his term as Chairman was to expire in December. *Tr.III:549.*

G. H. Kelsoe's office was the registered office of the new bar association and he was the registered agent. *Tr.III:557.* The Brownings' attorney Kelsoe was the President, and the Brownings' receiver John Wright was the Secretary-Treasurer, of the new bar association. *Tr.III:55-7-8.* Membership certificates were kept in Judge Walker's office, his court reporter typed up the certificates, and new members were notified by Wright to pick up their certificates at Judge Walker's court. *Tr.III:560-1.*

All membership certificates were issued by Judge Walker, *Id.* He testified that memberships were sold to lawyers. *Tr.III:564.* Judge Walker himself solicited memberships from the attorneys who appeared in his court. *Id.* The money collected from the sale of memberships and from the dues were kept in a "checking account across the street at the little bank by the courthouse" *(Tr.III:559)* on which Judge Walker co-signed checks with either Kelsoe or Wright. Whitley Sessions, the attorney for the Brownings' receiver, had always been a director, and J.R. Hurt, the personal accountant for both Judge Walker and Sessions (and the Walker-Browning expert witness) helped with the accounting and the I.R.S. *Tr. III:566.*

Judge Walker, Ayres, Kelsoe, Wright, Sessions and Hurt were all involved in their jointly organized "bar association" at the time of the Browning Case in 1982. *Tr.III:569--71.* Judge Walker did not know whether the bar association had a minute book. *Id. at 533.* But he knew where they kept their money *Tr.III:539)*, jointly controlled by Walker, Kelsoe and Wright. *Id.*

The district court in the present case sustained the Brownings' motion for summary judgment based on federal res judicata, and denied Petitioners motions for summary judgment based on the facts summarized above and asserting the voidness of the Walker Judgment under the due process clauses of the federal and state constitutions because of the disqualification of Judge Walker.

On appeal, the Dallas Court of Appeals affirmed. It ruled that all of Holloway's state constitutional claims were barred under the federal law of res judicata by virtue of the dismissal of the civil rights action of *Holloway v. Walker*. In that §1983 action, all of Holloway's pendent state claims, which included a claim that the Walker Judgment was void under the Texas constitution, were dismissed expressly without prejudice, a ruling specifically approved by the Fifth Circuit. See *Holloway v. Walker*, 784 F.2d at 1294.

Robbie was not a party in *Holloway v. Walker*. Therefore, it could not be claimed the judgment in that case was a res judicata bar to her prosecution of either her federal or state constitutional claims in the present case. But the Dallas Court of Appeals ruled that all of Robbie's federal and state constitutional claims were barred under the federal law of res judicata by the federal enforcement action of *Browning v. Navarro* in which she *was* a party. In that action the federal court had abstained in favor of the courts of the State of Texas from adjudicating any of the constitutional claims asserted there and in the present case, exempting from its abstention order only the single bankruptcy law

issue which had been ruled on at that time by the federal courts.[4]

REASONS FOR GRANTING WRIT

Because this notorious litigation involves the integrity of the judicial process itself, it goes to the very heart of our system of government. The facts established by the uncontroverted summary judgment record in the present case constitute what the Fifth Circuit, faced with only **some** of the facts shown by the record in the present case, has characterized as "a corrupt abuse of the judicial process".[5]

The other issues presented here, of the effect required to be given by state courts to federal court abstention orders and dismissals "without prejudice," are issues of general importance that constantly present themselves on a daily basis in our bifurcated judicial system. This Court, although consistently requiring state courts to honor federal judgments, has not articulated consistently the constitutional and legal bases of such requirement.[6]

Also, because this particular case is the product of a bizarre and convoluted series of interfacings between the lower federal courts and the Texas appellate courts, all resulting in the denial of any state or federal review of the

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[4] *See Browning v. Navarro*, 37 B.R. 201 (N.D. Tex. 1983) *rev'd Browning v. Navarro* 743 F.2d 1069 (5th Cir. 1984).

[5] *Browning v. Navarro II*, 826 F.2d 335, 345-346 (5th Cir. 1987).

[6] *See* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976); Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol. 18 § 4468, pp. 648-649 (1981).

merits of a huge, patently unconstitutional and grossly unjust judgment, this Court's decision of the case is merited.

The lands covered by the oil and gas leases transferred to the Respondents by the infamous Walker Judgment contain recoverable oil and gas reserves valued at more than one billion dollars, in addition to the more than $500,000,000.00 worth of hydrocarbons already produced to date. Because of the value of the properties involved, the prior notoriety of Judge Walker, and the widespread publicity concerning Judge Walker's conduct in the trial of the Browning Case, this litigation has been discussed wherever lawyers congregate and wherever oil men meet (which is everywhere in the world). Also, this litigation has directly affected literally thousands of landowners and royalty owners and hundreds of oil companies, service companies and individuals contractually connected with the corporate defendants in the Browning Case.

I. The decision of the Texas court of appeals conflicts with decisions of this Court regarding the preclusive, res judicata effect of federal court dismissals without prejudice and abstentions, and thereby conflicts with the Supremacy Clause of the United States Constitution and the federal law of res judicata.

This Court consistently has held that the dismissal of claims "without prejudice" or "on any ground which did not go to the merits" is not a res judicata bar to another action on those claims. *See Costello v. United States*, 365 U.S. 265, 286 (1961), quoting *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1986); *Swift v. McPherson*, 232 U.S. 51, 56 (1914); *Baxter v. Buchholz-Hill Trans. Co.*, 227 U.S. 637, 638 (1912)(Holmes, J.)("without prejudice"); In that regard, the circuit courts of the United States appear to be

uniformly of the view that a dismissal of state claims based on the refusal of a federal court to exercise its pendent jurisdiction is not a decision on the merits and therefore has no subsequent preclusive effect.[7]

Likewise, this Court has held repeatedly that, "a dismissal on the grounds of abstention so as to permit a state court to pass on an issue of state law *must not be with prejudice*. *A.T.L.A. v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973)(citations omitted)(emphasis added). This general principle has been echoed more recently by the Fifth Circuit. *DuBroff v. DuBroff*, 833 F.2d 557, 563 (5th Cir. 1987)

In this case the Texas court of appeals determined that the Holloways' state claim for a bill of review was precluded by res judicata due to the prior federal court litigation with Respondents in the § 1983 action (*Holloway v. Walker*) and the bankruptcy enforcement action (*Browning v. Navarro*). The court of appeals disregarded the crucial fact that in the § 1983 action, to which Robbie was not a party, the court declined to exercise its pendent jurisdiction over Holloway's state law claims and dismissed them expressly without prejudice. Appendix at 38a-42a . The court of appeals also disregarded the fact that in the bankruptcy enforcement action the bankruptcy court had abstained from determining either the federal or state law claims which were presented to it. Appendix at 52a-56a, 57a-59a .

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[7] *See Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556, 562-563 (5th Cir. 1983)(en banc); *Gregory v. Mitchell*, 634 F.2d 205, 206-207 (5th Cir. 1981); *Management Investors v. U.M.W.*, 610 F.2d 384, 395 (6th Cir. 1979); *Graf v. Elgin, J. & E. Ry. Co.*, 790 F.2d 1341, 1347 (7th Cir. 1986).

The §1983 action of *Holloway v. Walker* asserted that the Walker Judgment was void under the Due Process Clause of the 14th Amendment. In Holloway's amended complaint in that case he also "invoke[d} the pendent jurisdiction of this Court to consider [his] state law causes of action which arise out of the same common nucleus of operative facts that have given rise to [his federal claim]".[8] In Count Six of this amended complaint, Holloway expressly adopted the same factual allegations as he made under the federal § 1983 claim in Count one (para. 1-153) of the complaint. Under both the federal law and the state law previously invoked, Holloway sought in Count Six, and prayed for both there and at the end of his complaint, a declaratory judgment that the Walker Judgment was "void".[9]

The federal district court, in dismissing Holloway's federal claims *with prejudice*, stated the following;

> "Without expressing an opinion on the merits of the allegations in this case...[s]uch claims are better relegated to the normal corrective processes of the state courts."

Appendix p. 40a. The district court, in the same order, declined to exercise jurisdiction over the pendent state claims, and dismissed them *without prejudice* with the following language:

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[8]Appendix p. 35a ; Brownings' Amended Motion for Summary Judgment, Vol. I, Ex. 89, p.7 ¶4.

[9]Appendix p. 36a-37a ; *id.* p.60, ¶192 and p.63, ¶2.

"Pendent Claims

Plaintiffs also assert several pendent claims....

The court is of the opinion that the viable pendent claims, if any, should be heard in the state courts. The ultimate decision of the ownership of the property underlying the claims will eventually come from the state courts....No motions addressed to the substance of the pendent claims have been filed or considered by this Court. An adequate state forum is available,

* * *

Accordingly...Plaintiffs' claims under 42 U.S.C. §1983 are DISMISSED WITH PREJUDICE; and Plaintiffs' pendant claims are DISMISSED WITHOUT PREJUDICE TO THE TIMELY REFILING OF SAME IN STATE COURT.

Id.

The matter over which the bankruptcy court abstained was a state court petition in the case styled *Jaehne v. Starnes*, removed by Respondents, which alleged, *inter alia*, the voidness of the Walker judgment as a matter of 14th Amendment Due Process as well as other grounds. Appendix at 49a *et seq* . Upon being presented with a copy of said petition, the federal district court presiding over *Browning v. Navarro* twice abstained "in favor of the courts of the State of Texas" with respect to all claims and issues involving the validity of the Walker Judgment other than the one federal bankruptcy law issue it had already decided (and which the Fifth Circuit had reversed). The district court ruled as follows:

> Resolution of the issues raised by Holloway in *Jaehne* regarding conflicting title may be an arduous and lengthy process involving parties beyond those involved in the instant suit.....Accordingly, this Court hereby ABSTAINS in favor of the courts of the State of Texas from the resolution of any issues regarding the identity of or conflicting claims of title to assets subject to a constructive trust by the [Walker] Judgment....
>
> ...To the extent that there are disputes as to the identity of or conflicting claims to any such property, the claimants may proceed in a court of competent jurisdiction to adjudicate title to said property in the possession of Plaintiffs.

Appendix p. 54a-55a . In this opinion and order dated June 28, 1985, the federal district court also ruled, in response to Holloway's request, that "no state court remedies for...whatever theories may be devised have been foreclosed by this Court." This was *after* the April 18, 1985 dismissal by the district court of *Holloway v. Walker* which the Dallas Court of Appeals wrongly has ruled also foreclosed all of Holloway's state court remedies.

By opinion and order dated July 16, 1985, the district court amended its abstention order to read as follows:

> Accordingly this Court will ABSTAIN in favor of the courts of the State of Texas from the resolution of any issues regarding conflicting claims to title to assets subject to a constructive trust by the [Walker] Judgment on the basis of claims other than those adjudicated in this Court by parties to this action"

Appendix p. 58a-59 . Concurrently with this ruling, *Jaehne v. Starnes* was remanded to the state district court.

It is, therefore, clear that the state law claim which the court of appeals held to be precluded on the basis of a prior opportunity to be heard was in fact dismissed without prejudice on both occasions. Both dismissals were affirmative decisions by the federal courts to not exercise jurisdiction over the state law claims presented. In that regard this Court "has long recognized that 'the principles of res judicata apply to questions of jurisdiction as well as to other issues'", *Underwriters' Nat. Asurr. v. N. C. Life & Acc.*, 455 U.S. 691,706 (1982), and "as well to jurisdiction of the subject matter as of the parties." *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939).

In other words, the federal courts' refusal to exercise jurisdiction over the state law claims was an issue which had been adjudged preclusively and which the court of appeals was bound therefore to accept as controlling in its consideration of the issue before it. As such, the judgment of the Court of Appeals not only conflicts with the federal law of res judicata but also fails to give full and proper effect to the judgments of the federal courts.

A state court's disregard of federal judgments raises in turn a federal question. See *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938), and *Meyers v. International Trust Co.* 263 U.S. 64, 69 (1923). This Court has observed that the proper method of resolving that question is by requesting certiorari from the Court. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986). Whether a federal judgment has been given full faith and credit implicates the Supremacy Clause, because, " States cannot...vest state courts with power to violate the supreme law of the land." *Kalb v. Feurestein*, 308 U.S. 433, 439 (1940). As one judge of the

Third Circuit has observed, "The ultimate source for binding state courts to federal decrees is the Supremacy Clause...." *Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania*, 755 F.2d 38, 46 (3rd Cir. 1985)(concurring opinion), *cert. denied*, 474 U.S. 819 (1985).

The Court therefore should grant certiorari in this cause and summarily correct the Court of Appeals' erroneous determination that the federal court judgments created a res judicata bar to the prosecution of the Holloways' state law claim and of Robbie's state and federal claims of Judge Walker's disqualification.

II. The decision of the Court of Appeals insulates from review and remedy a patently corrupt and void judgment, and thus conflicts with decisions of this Court concerning the Due Process Clause of the 14th Amendment.

By holding Holloway's state law claims and Robbie's state and federal law claims barred by res judicata, the Texas court of appeals became the most recent court to avoid dealing with the merits of Holloway's state constitutional claim and Robbie's state and federal claim that the Walker judgment was rendered by a trial judge who was so personally and financially involved with counsel and agents of Respondents that there is no question that he was constitutionally disqualified by virtue of both his financial interest in the case and his clearly exhibited bias against Petitioners. Although Holloway's state constitutional claim is not a matter for this Court, a determination by the Court that Robbie's 14th Amendment Due Process rights were violated would serve as a "floor"[10] supporting Holloway's state claim since the Texas Supreme Court has held that the

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[10] *Nelsen v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984).

Due Course of Law provision of the Texas Constitution affords greater rights and imposes higher standards than the 14th Amendment.[11]

Judge Walker had an undeniable financial interest in paying nearly $100,000.00 out of the funds of the defendant Humble to his own personal attorneys and personal accountant who had been, and were currently, performing unpaid legal and accounting services for him in other matters. And once Judge Walker had made these illegal payments to his personal attorneys and accountant out of Humble's funds through his unlawful receiverships, then he had an obvious interest in assuring that they not be required to disgorge the money they had received as ordered by the appellate court. A judgment against Holloway divesting him of his ownership of Humble was the only way to assure that result.

Judge Walker also had an undeniable financial interest in having the personal lawyer he privately hired to represent him against the Holloways in the Browning Case, former District Judge Robert H. Hughes, paid out of the funds of the defendant Humble instead of out of his own personal funds. And once Judge Walker did this, then he had an obvious interest in assuring that Holloway did not regain control of his company so as to be in a position to seek reimbursement from Judge Walker. A judgment against Holloway divesting him of his ownership of Humble was the only way to assure that result.

This Court has stated clearly that a substantial possibility of even an indirect financial benefit, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), or the

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[11] *Sax v. Voteller*, 648 S.W.2d 661 (Tex. 1983); *Learoy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986); see *Sun Exploration Co. v. Jackson*, 783 S.W.2d 202, 206 (Tex. 1990).

existence of an irregular and sporadic business relationship with a party, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), is sufficient to result in the disqualification of a tribunal under the Due Process Clause of the 14th Amendment. The uncontroverted facts established in this cause show a direct, substantial, and obvious benefit flowing to Judge Dee Brown Walker because of his involvement in the original litigation, just as those uncontroverted facts show a regular, continuous personal and business relationship between Judge Walker and representatives of Respondents up to and through the trial of the original cause. Yet the merits of the claim of constitutional disqualification have never been determined by any court.

This Court also has stated clearly that even the appearance of bias on the part of a tribunal, *In Re Murchison*, 349 U.S. 133, 139 (1955), or the existence of any factor which might tempt a tribunal to "not hold the balance nice, clear, and true...," *Tumey v. Ohio*, 273 U.S. 510, 513 (1923), denies the defendant due process of law. This constitutional deprivation is only magnified when, as was the case here, the tribunal "become[s] so personally embroiled-...as to make [himself] unfit to sit in judgment...." *Mayberry v. Pennsylvania*, 400 U.S. 455, 464-465 (1971). Yet in this case the merits of Judge Walker's personal involvement and bias have been shielded once again from review or any remedy.

This error is further compounded by the fact that it is accomplished by a refusal by the Texas court of appeals to give proper effect to federal court judgments. Federal judgments have been mischaracterized and misused to insulate once again a deprivation of due process from correction. Petitioners respectfully submit that fact alone should be sufficient to justify the granting of certiorari in this

case and summary reversal of the judgment of the Court of Appeals for the Fifth Supreme Judicial District of Texas.

CONCLUSION

Petitioners Pat S. Holloway and Robbie Holloway therefore urge respectfully that for the foregoing reasons their petition should be granted and the judgment of the Court of Appeals for the Fifth Supreme Judicial District of Texas summarily reversed. Upon summary reversal, Petitioners submit that the Walker judgment should be vacated as to Robbie Holloway on the basis of the egregious violation of her 14th Amendment right to a financially disinterested and impartial trial judge, and the remainder of the cause should be remanded for consideration of Pat S. Holloway's state claims.

Respectfully submitted,

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APPENDIX A

Affirmed and Opinion filed June 30, 1992.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00571-CV

PAT S. HOLLOWAY, ET AL., Appellants

V.

MICHAEL G. STARNES, ET AL., Appellees

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 86-07704-I

O P I N I O N

Before Justices Stewart, Baker, and Maloney
Opinion by Justice Stewart

Pat S. Holloway, Robbie Holloway, and Flojo Trading Corporation (collectively appellants) appeal from a summary judgment granted in favor of Michael G. Starnes and the Browning family (collectively appellees) on

appellants' bill of review. Each appellant has filed a separate brief, complaining that the trial court erred in granting appellees' amended motion for summary judgment and in denying their first, third, and sixth motions for partial summary judgment. Additionally, Pat Holloway (Holloway) argues that the trial court erred in denying his request to supplement the summary-judgment record and in permanently enjoining further attack on the judgment in favor of the Brownings. We affirm the trial court's judgment.

FACTUAL BACKGROUND

The litigation between the parties began on September 12, 1979, when the Brownings sued Holloway, Robbie, Humble Exploration Company, and others in Texas state court seeking a constructive trust on Humble's and Holloway's assets, appointment of an interim receiver to manage the disputed assets, and damages (the 1979 case). The 1979 case was filed in the 193rd District Court in Dallas County, Texas. Holloway, Robbie, and Humble filed Chapter 11 voluntary bankruptcy petitions on November 19, 1979 and removed the 1979 case to the United States Bankruptcy Court for the Northern District of Texas (the bankruptcy court). The bankruptcy court remanded the cause to the 193rd District Court and modified the automatic stay to permit trial of the case.

In 1982, a group of investors sued Holloway and the Brownings in the 162nd District Court of Dallas County, Texas, alleging that Humble had wrongfully shut in oil and gas wells jointly owned by Humble and the investors and seeking appointment of a receiver over Humble's assets (the 1982 case).[1] The Brownings cross-claimed against

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1. The Brownings were named as defendants because of their claim in the 1979 case to ownership of the Holloway/Humble assets.

Holloway, alleging the same issues pending in the 1979 case. After a series of orders, the 1979 and 1982 cases were consolidated for trial in the 162nd District Court by Judge Dee Brown Walker, the elected judge of that court. Judge Walker later severed the 1979 and 1982 cases and granted the Brownings an expedited trial of the 1979 case. On October 12, 1982, Holloway converted his Chapter 11 bankruptcy proceeding to a Chapter 7 liquidation proceeding. The bankruptcy court appointed a trustee. On November 11, 1982, the trial court entered an amended judgment for the Brownings imposing a constructive trust on Humble's and Holloway's assets and awarding $72 million in damages (the Walker judgment).[2]

On November 18, 1982, Holloway sued Judge Walker, the Brownings, and the Brownings' attorneys in federal court under title 42, section 1983 of the United States Code (the civil rights suit). Holloway alleged that the Brownings, their attorneys, and Judge Walker had conspired to deny him a fair trial in the state-court trial of the 1979 case. The district court dismissed with prejudice Holloway's section 1983 claim and dismissed without prejudice his pendent state-law claims for negligent and wrongful receivership. The judgment was affirmed on appeal. *Holloway v. Walker*, 784 F.2d 1287 (5th Cir.), *cert. denied*, 479 U.S. 984 (1986).

After filing the civil rights suit, Holloway appealed the Walker judgment to this Court, but posted no supersedeas bond to stay its execution. In March 1983, the Brownings sued in the federal bankruptcy court to enforce the Walker judgment (the enforcement action). The bankruptcy court

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2. The 1982 case remained dormant until 1987, when the Brownings' third-party complaint against Holloway was dismissed with prejudice upon the parties' joint motion.

upheld the bankruptcy's trustee's defense that the trial of the 1979 case violated the bankruptcy court conditional remand order requiring trial before a visiting or retired judge and that, therefore, the Walker judgment was void. *See Browning v. Navarro*, 37 B.R. 201, 210 (N.D. Tex. 1983). Then, on July 11, 1984, this Court granted the Brownings' motion to dismiss Holloway's appeal on the ground that his defense to the enforcement action was a review of the Walker judgment that was inconsistent with his direct appeal and that Holloway was not entitled to two types of review of the Walker judgment. *Humble Explor. Co. v. Browning*, 677 S.W.2d 111, 114-15 (Tex. App.--Dallas 1984), *on mot. to reinstate*, 690 S.W.2d 321 (Tex. App.--Dallas 1985, writ ref'd n.r.e.) (en banc), *cert. denied*, 475 U.S. 1065 (1986). Subsequently, the Fifth Circuit reversed the district court's decision in the enforcement action that the judgment was void and held that the 162nd District Court had jurisdiction to enter the Walker judgment. *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984) (Browning I). Thereafter, this Court vacated its prior order of dismissal; however, we later reinstated the order of dismissal. *Humble Explor. Co. v. Browning*, 690 S.W.2d 321 (Tex. App.--Dallas 1985, writ ref'd n.r.e.)(en banc), *cert. denied*, 475 U.S. 1065 (1986). On remand of the enforcement action, the bankruptcy court denied Holloway's motion for summary judgment based on alleged fraud in the state-court proceedings. Holloway appealed, and the Fifth Circuit narrowed the issues in the case as follows: (1) Holloway could argue that the Walker judgment was void because it was obtained by fraud; and (2) the Brownings could argue that res judicata barred Holloway from raising the issue of fraud. *Browning v. Navarro*, 826 F.2d 335, 346 (5th Cir. 1987) (Browning II). On remand, the bankruptcy court denied the Brownings' motion for summary judgment and held that res judicata did not bar Holloway's attack on the Walker judgment. This issue was certified for interlocutory appeal. On appeal, the Fifth

Circuit reversed and held that res judicata precluded Holloway's claims that the Walker judgment was procured by fraud. *Browning v. Navarro*, 887 F.2d 553, 559-60 (5th Cir. 1989) (Browning III).

On June 16, 1986, appellants filed this combined collateral attack and bill of review in the 162nd District Court attacking the Walker judgment. The bill of review alleged that appellants had meritorious defenses to all of the claims asserted by the Brownings in the trial of the 1979 case. They further alleged that, through no fault, negligence, or lack of diligence on their part, they were prevented from fully presenting their defenses because of (1) Judge Walker's bias, fraud, and conspiracy with the Brownings, their attorneys, and others and (2) Judge Walker's various unconstitutional and illegal rulings. Holloway also asserted that he had no control over and no way to prevent Judge Walker's bias and fraudulent conspiracy with the Brownings and their attorneys. Appellees subsequently moved for summary judgment. Appellants filed several motions for partial summary judgment. The trial court granted appellees' amended motion for summary judgment and enjoined Holloway and Robbie from further state-court litigation seeking to overturn the Walker judgment. Appellants then perfected this appeal.

APPELLEES' MOTION FOR SUMMARY JUDGMENT

Appellees' amended motion for summary judgment alleged, *inter alia*, that: (1) appellants' collateral attack and bill of review were barred by res judicata and collateral estoppel; (2) the collateral attack was without merit because the Walker judgment contains a jurisdictional recital that imports absolute verity and is conclusive; (3) Flojo is prohibited by section 171.252 of the Texas Tax Code from either suing or defending a suit in the Texas courts; and (4)

this Court dismissed appellants' appeal because they elected their remedy by claiming in defense to the enforcement action that the Walker judgment was void.

A bill of review, when properly brought, is a direct attack on a judgment. *Fender v. Moss*, 696 S.W.2d 410, 412 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). It is proper method to attack a judgment when the trial court had jurisdiction to render judgment on the merits. *Gonzalez v. Mann*, 584 S.W.2d 928, 930 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.). The purpose of a direct attack is to change the former judgment and to secure the entry of a correct judgment. *Austin Indep. School Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973). This relief may be obtained on the basis of any error that probably caused the rendition of an improper judgment. *Id.* In a direct attack, such as a bill of review, no presumptions are indulged in support of the judgment's validity. *Fender*, 696 S.W.2d at 412.

A collateral attack is proper only if the judgment if "void in law." *Gonzalez*, 584 S.W.2d at 930. The judgment of a court of general jurisdiction is not subject to collateral attack except on the ground that it had no jurisdiction of the person of a party or his property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court. *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987) (citing *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985)); *Austin Indep. School Dist.*, 495 S.W.2d at 881. Errors other than lack of jurisdiction render the judgment merely voidable. *Cook*, 733 S.W.2d at 140. In a collateral attack, extrinsic evidence may not be used to establish a lack of jurisdiction. *Huffstutlar v. Koons*, 789 S.W.2d 707, 710 (Tex. App.--Dallas 1990, orig. proceeding) (en banc). Jurisdictional recitals in the judgment control the rest of the

record so that, even though other parts of the record show a lack of jurisdiction, if the judgement recites the contrary, the collateral attack fails. *Id.*

A. Holloway's Arguments

In his first point of error, Holloway complains that the trial court erred in granting appellees' amended motion for summary judgment. Holloway's arguments under his first point of error concern only the granting of summary judgment on the bill of review. He raises no argument concerning the trial court's granting of summary judgment on his collateral attack. Holloway states that the granting of appellees' summary-judgment motion presents this Court with two issues of first impression in this state: (1) whether the prior dismissal of an appeal that does not involve a determination on the merits of the issues presented precludes a subsequent petition for bill of review either by application of res judicata or by concluding that the petitioner had failed to pursue available appellate remedies; and (2) whether related litigation in the federal court system that has not resulted in a determination of the merits of the issues presented by the bill of review will preclude the bill of review by application of res judicata or collateral estoppel. Accordingly, our discussion of Holloway's first point of error concerns only the bill of review.

In reviewing a summary-judgment record, this Court applies the following standards:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
>
> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985). When the trial court's judgment does not state the grounds upon which it granted the motion for summary judgment, the appellant must show that each of the independent arguments alleged in the motion is insufficient to support summary judgment. *McCrea v. Cubilla Condominium Corp.*, 685 S.W.2d 755, 757 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). Thus, if we determine that one of the grounds alleged supports the summary judgment, we affirm.

Appellees alleged in their amended summary-judgment motion that res judicata bars the claims raised in the bill of review. Res judicata applies to bill-of-review proceedings. *Rizk v. Mayad*, 603 S.W.2d 773, 779 (Tex. 1980); *see Browning v. Navarro*, 923 F.2d 377 (5th Cir. 1991) (per curiam) (Browning IV). The res judicata effect of federal litigation on subsequent state-court litigation is governed by the federal law of res judicata. *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985). For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits, and both cases must involve the same cause of action.

Browning III, 887 F.2d at 558 (citing *Nilsen v. City of Moss Point*, 701 F.2d 556, 559 (5th Cir. 1983)). Res judicata bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication. *Nilsen*, 701 F.2d at 560 (citing *Allen v. McCurry*, 449 U.S. 90,94 (1980)). It does not apply merely to those causes of action that were adjudicated. *Nilsen*, 701 F.2d at 560. A claim is not barred by res judicata if it could not have been brought. *Browning III*, 887 F.2d at 558.

Holloway acknowledges that "there is no question that the claims for relief presented by [him] in this bill of review arise out of the same common nucleus of operative fact as the claims and defenses asserted in the related federal litigation, such that in Restatement terms this case and the federal litigation involve the same transaction or cause of action." *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). He asserts, however, that the federal-court judgments cannot bar this bill of review because the federal courts had no jurisdiction to hear this claim for equitable relief. *See Placke*, 698 S.w.2d at 363 (bill of review can be brought only in court that rendered the judgment sought to be vacated. He contends that the prior federal-court litigation is of no consequence to this bill-of-review proceeding. We disagree.

Holloway's analysis focuses on the nature of the proceeding itself. Res judicata, however, focuses on whether *claims* were or could have been brought in a prior action. The fact that the federal courts had no jurisdiction to hear Holloway's bill-or-review *proceeding* is irrelevant in determining whether his present *claims* were or could have been brought in a prior federal-court proceeding. If Holloway's present claims either were or could have been asserted in a prior proceeding, res judicata bars this bill of review. Accordingly, to determine the preclusive effect, if

any, of the prior litigation between the parties, we first must pinpoint the nature of the claims asserted by Holloway then and now. If his claims are the same, we then must determine whether the claims either were or could have been brought in the prior federal litigation.

Appellees urge that all of Holloway's present claims either were or could have been presented in either the enforcement action or in the civil rights suit. In both cases, Holloway sought to avoid enforcement of the Walker judgment. In the civil rights suit, Holloway brought a section 1983 action against Judge Walker, the Brownings, legal counsel for the Brownings, and others, alleging that they had conspired to violate his civil rights in the 1979 case. Holloway asserted that the Walker judgment was void because the defendants had conspired to seize control of Humble through the abuse of Judge Walker's judicial office. *Holloway v. Walker*, 784 F.2d at 1289. Specifically, Holloway alleged that: (1) Judge Walker, the Brownings, the Brownings' attorneys, and the other defendants had arranged to have the 1982 case brought before Judge Walker's court contrary to the usual procedure for assigning cases; and (2) Judge Walker arranged to have the 1979 and 1982 cases consolidated in his court, imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of this Court to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted guards at Humble's headquarters to seize the building, prohibited release of corporate and legal files during the trial, and conducted ex parte meetings at a hotel near the courthouse regarding Humble's business. *Browning II*, 826 F.2d at 338. The district court granted summary judgment to all defendants, holding that the alleged acts of judicial conspiracy and lack of postdeprivation remedy did not amount to a violation of

substantive due process cognizable under section 1983.[3] *Holloway*, 784 F.2d at 1290. The Fifth Circuit affirmed the summary judgment. *Id.*

In the enforcement action, Holloway urged that the Walker judgment was void because (1) it violated the automatic stay since it was not tried before a visiting or retired judge, and (2) Judge Walker and the Brownings' attorneys colluded to deprive him of a fair and complete trial by corruptly abusing the judicial process. After the district court's summary judgment for Holloway on the first ground above was reversed on appeal, *Browning I*, 743 F.2d at 1076-86, Holloway moved for summary judgment on the ground that Judge Walker and the Brownings' attorneys had colluded to corruptly abuse the judicial process. Specifically, Holloway asserted that the Brownings' attorneys clandestinely acted to have the 1979 case consolidated with the 1982 case and, behind Holloway's back, arranged to have the case set before Judge Walker, that Judge Walker was known to be under the control of the Brownings' attorneys, who often bragged about this fact, that the Brownings' attorneys bragged about their plans to "gut" Holloway in Judge Walker's court; that Judge Walker engaged in numerous private conferences with the Brownings' attorneys regarding the Brownings' attempts to take control of Humble's and Holloway's assets; that the Brownings' attorneys and Judge Walker engaged in private conferences during trial and colluded to give the jury instructions favorable to the Brownings; that Holloway was not given proper notice of meetings relating to the trial; that Holloway

---

3. The court noted that Texas courts in fact provided an adequate postdeprivation remedy through the right of appeal, which had been lost through a unique, complex mix of events "which Holloway played a major part in creating."

was denied access to documents and files necessary to his defense because the receiver removed the documents and files from Humble's offices; that Judge Walker's mid-trial order discharging Holloway's and Humble's attorneys denied Holloway the right to effective counsel; that one of the Brownings' attorneys acted as bailiff for the jury during the course of the trial; and that, during the course of trial, the Brownings' attorneys were actively representing Judge Walker in other matters. *Browning II*, 826 F.2d at 345-46. The district court denied Holloway's summary-judgment motion.

The Fifth Circuit again reversed and held that the only defense remaining available to Holloway was that the Walker judgment was procured by fraud, although res judicata might bar consideration of the issue. *Id.* at 346. It stated that, to satisfy his burden to demonstrate that the Walker judgment was procured by fraud, Holloway had to demonstrate that the judgment was obtained as a result of a scheme or collusion that (1) was designed to corruptly influence the proceedings or to inhibit the ability of an adverse party to fully present his case or defense and (2) had the effect of foreclosing to him the opportunity to have a fair and complete trial. *Id.* at 345. To set aside the judgment, the court had to be convinced that the trial was rendered so fundamentally unfair by the scheme or collusion that the court lacked confidence that the judgment was soundly based on law and fact. *Id.* The Fifth Circuit stated that Holloway's pleadings, affidavits, and briefs alleged facts that, if proved, might meet this test. *Id.* If Holloway could satisfy his burden to show that the judgment was procured by fraud *and if res judicata did not bar consideration of that issue*, the bankruptcy court would determine the extent to which the Walker judgment would be enforced. *Id.* at 346. The court remanded the cause with instructions to allow the

Brownings to amend their summary-judgment motion to allege res judicata. On remand, the motion was so amended. The district court denied the Brownings' motion.

On interlocutory appeal from this judgment, the Fifth Circuit reversed and held that Holloway's claim was precluded by res judicata. The court noted that, in the enforcement action and in the civil rights case, the gravamen of Holloway's complaints was that the Walker judgment was fraudulently obtained. *Browning III*, 887 F.2d at 558. The court stated that the first three requirements of res judicata were satisfied because both claims involved one cause of action, the parties to the second actions were the same, and the civil rights judgment was final and on the merits. *Id.* The fourth prerequisite for application of res judicata was satisfied because the fraud claim could have been brought in prior suits between the parties. First, the bankruptcy court was authorized to entertain a motion to vacate the allegedly fraudulent state-court judgment. *Id.* at 559 (citing 11 U.S.C. § 105). Second, Holloway could have raised his fraud claim by invoking the bankruptcy jurisdiction of the district court that heard the civil rights case under the Emergency Rule.[4] *Browning III*, 887 F.2d at 560. Holloway's bankruptcy was still in progress when he brought the civil rights case, and he would have initiated an adversary proceeding had he sought to enjoin the Walker judgment. Under the Emergency Rule, a proceeding to enjoin a court had to be heard by the district court. Through this process, the district court hearing the civil rights case could have heard Holloway's fraud claims.

---

4. After the United States Supreme Court declared unconstitutional the grant of jurisdiction to bankruptcy courts under the Bankruptcy Reform Act of 1978, an "Emergency Rule" was adopted and governed bankruptcy proceedings until the Bankruptcy Amendments and Federal Judgeship Act of 1984 was enacted. *Browning III*, 887 F.2d at 560.

Id. at 560 & nn.11-13. Because all requirement of res judicata had been met, the Fifth Circuit concluded that Holloway's fraud claims were barred.

The Fifth Circuit recently pointed out that, although nothing in the district court judgment or in any federal opinion prejudiced Holloway's right to seek an equitable bill of review, the principles of res judicata or collateral estoppel may bar particular claims or issues sought to be raised by such a bill. *Browning IV*, 923 F.2d at 377.

Holloway's bill of review at issue in this appeal alleges that he was prevented from fully presenting his meritorious defenses at the trial of the 1979 case because of (1) Judge Walker's bias, fraud, and conspiracy with the Brownings, their attorneys, and others and (2) Judge Walker's various unconstitutional and illegal rulings. Holloway's pleading asserts that Judge Walker: (1) "acted as counsel" in the 1979 case; (2) was "interested" in the case; (3) was biased; and (4) conspired with the Brownings to decide the 1979 case against appellants. Holloway relies on most of the factual allegations relied on in the civil rights case and in the enforcement action to support his conspiracy and corruption theories. Holloway did not assert in those previous cases that Judge Walker was interested because he allegedly hired a former Dallas County judge to represent him in the case and paid him out of Humble's assets. However, this factual allegation could have been made in either of the prior suits in support of Holloway's fraud claim. The rest of Holloway's factual allegations have been asserted in previous actions and in this action for one purpose--to have the Walker judgment set aside as void or voidable. Holloway's present claims arise out of the same facts and involve the same parties as the civil rights case and the enforcement action. The judgments in both prior cases are final and on the merits. Holloway either made or could have

made all of the claims that he now asserts in either the civil rights case or in the enforcement action. Further, the Fifth Circuit in the enforcement case determined that Holloway's attempt to set aside the Walker judgment based on these same factual allegations was barred by res judicata. *Browning III*, 887 F.2d at 558-69. We conclude that Holloway's bill-of-review claims are barred by res judicata and, thus, cannot be asserted in an equitable bill of review. Accordingly, the trial court did not err in granting summary judgment against Holloway. We overrule Holloway's first point of error.

B. Robbie's Arguments

In her first point of error, Robbie contends that the trial court erred in granting summary judgment against her. Robbie argues that the claims and issues asserted here were not and could not have been litigated in either of the cases to which she was a party, *i.e.*, the direct appeal of the Walker judgment to this Court and *Browning I*. Robbie concedes that she is barred from litigating whether the 162nd District Court had jurisdiction to enter the Walker judgment because the issue was decided in *Browning I*. She asserts that she is not barred by the subsequent proceedings in *Browning II, III,* or *IV* because she did not participate in those appeals or by the civil rights suit because she was not a party. Robbie further contends that her bill-of-review claims that the Walker judgment was the product of extrinsic fraud, conspiracy, and collusion between Judge Walker and the Brownings did not arise until Judge Walker entered the Walker judgment and could not have been presented to this Court on the record of the appeal of the Walker judgment. She concludes that neither this Court's dismissal of the appeal of the Walker judgment, nor the appeals in the enforcement action (beyond *Browning I*), nor the civil rights suit bars her bill of review or collateral attack.

As previously stated, res judicata focuses on claims that were or could have been raised in prior litigation between the parties, not on whether particular issues actually were decided. Robbie was a party to the enforcement action when it was filed, and, as previously stated, the claims asserted here could have been raised in the enforcement action. *See id.* at 559. It is of no consequence that Robbie was not a party to the appeals when the claims or issues actually were decided. For res judicata purposes, it does not matter whether a claim actually was litigated, only whether the claim could have been brought. *Nilsen*, 701 F.2d at 560. Robbie cannot avoid the effects of res Judicata on the ground that she did not participate in the cases on appeal. Because Robbie could have brought her claims in the enforcement action, we need not determine whether they could have been brought in the direct appeal to this Court. We conclude that res judicata bars Robbie from bringing the present claims in an equitable bill or review or a collateral attack.

Further, Robbie may not collaterally attack the Walker judgment on the ground that Flojo was not served and did not appear. If a court having potential jurisdiction renders a judgment when the potential jurisdiction has not been activated and the defect is apparent *from the fact of the judgment*, then the judgment is void and subject to either direct or collateral attack. *Waldron v. Waldron*, 614 S.W.2d 648, 650 (Tex. Civ. App.--Amarillo 1981, no writ). If, however, a court having potential jurisdiction renders a judgment regular on its face that contains recitations stating that its potential jurisdiction has been activated, the judgment is voidable, not void, and may be set aside only by direct attack. *Id.* Thus, the claims made by Robbie are not the type available to her in a collateral attack on the Walker judgment. We overrule Robbie's first point of error.

C. Flojo's Arguments

In its first point of error, Flojo alleges that the trial court erred in granting appellees' motion for summary judgment based on res judicata because it was not a party either to the original Walker judgment sought to be vacated or to any subsequent case which could bar this bill of review. Flojo contends that it never was named, never was served, and never appeared in the trial of the 1979 case and that, therefore, it need not meet the requirements for a bill of review because the Walker judgment is void. *See Peralta v. Heights Med. Center*, 485 U.S. 80 (1988). It argues that it is not barred by res judicata or collateral estoppel because it was not a party to the prior federal litigation. Flojo concludes that there is no legal justification for any claim that its constitutional and equitable right to set aside the Walker judgment is barred by res judicata.

In addition to res judicata, appellees' summary-judgment motion asserted that Flojo could neither sue nor defend a suit in Texas courts because it had forfeited its corporate charter. *See* Tex. Tax Code Ann. § 171.252 (Vernon 1982). Appellees filed a certified copy of the document from the Texas Secretary of State that ordered the forfeiture of Flojo's certificate of authority on February 20, 1984. Flojo filed no response to appellees' motion. Nothing in the summary-judgment record suggests that Flojo regained its corporate privileges. We note that Flojo has attached to its brief as Exhibit B a copy of a document from the Texas Comptroller of Public Accounts stating that Flojo, as of March 4, 1991, is "in good standing" with that office. This document, however, is not part of our record on appeal and was not before the trial court when it granted appellees' amended motion for summary judgment. Thus, we cannot

consider it in this appeal. *Perry v. Kroger Stores Store No. 119*, 741 S.W.2d 533, 534 (Tex. App.--Dallas 1987, writ denied).

Flojo does not assert a general point of error that the trial court erred in granting summary judgment against it. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). Instead, on appeal, it specifically contends that res judicata does not apply to it. Flojo fails to argue on appeal that the trial court erred in granting summary judgment on the ground that forfeiture of its corporate charter barred this attack on the Walker judgment. Because summary judgment may have been granted, properly or improperly, on a ground not challenged by Flojo in a point of error on appeal, we affirm the summary judgment as to Flojo. *Id.; King v. Texas Employers' Ins. Ass'n*, 716 S.W.2d 181, 182-83 (Tex. App.--Fort Worth 1986, no writ). We overrule Flojo's first point of error.

APPELLANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

A. First and Sixth Motions

In their respective third and fourth points, appellants urge that the trial court erred in denying their first and sixth motions for partial summary judgment. Those motions urged that Judge Walker was disqualified to preside over the 1979 case due to his pecuniary and personal interest, his acts as "counsel" in the 1979 case, and his bias in the case. For these reasons, appellants contended that the Walker judgment was void. The disqualification claims are based on the same facts that appellants have relied on for their fraud, collusion, and conspiracy claims. Because we hold that the trial court properly granted summary judgment on these claims, we also hold that the trial court did not err in denying appellants'

first and sixth motions for partial summary judgment. We overrule appellants' respective third and fourth points of error.

B. Third Motion

In their respective second points of error, appellants argue that the trial court erred in denying the third motion for partial summary judgment asserting that the Walker judgment is void because it imposed joint and several liability on Holloway, Robbie, and Flojo although Flojo never was named as a defendant, never was served with process, and never appeared in the 1979 case. Robbie, but not Flojo, adopted Holloway's amended third motion for partial summary judgment. Holloway attached to this motion the affidavit of Joe Holt, who stated that Flojo was owned and operated by individuals other than Holloway and that Flojo never was named as a party, never was served with process, and never appeared in the case. At the trial of the 1979 case, the jury found that Flojo was Holloway's alter ego; the trial court so found in the Walker judgment.

Our determination that res judicata applies to appellants' claims dealing with the facts set forth above does not dispose of appellants' respective second points of error. A finding that res judicata bars appellants' bill of review does not dispose of the issue of whether the judgment is void because of lack of service.

Holloway argues that a judgment against a "party" who never was named, never was served with process, and never appeared is absolutely void and of no effect and that federal due process requires that such a judgment be set aside in a bill-of-review proceeding without regard to satisfaction of the other requirements of a bill. He contends that the 162nd District Court had no jurisdiction to enter a judgment

imposing liability against Flojo. Thus, he asserts that the joint judgment is indivisible in nature and is void as to all defendants named in it if it is void as to one of them. *See Reed v. Gum Keepsake Diamond Center*, 657 S.W.2d 524 (Tex. App.--Corpus Christi 1983, no writ).

Reed is distinguishable from this case. There, the trial court never obtained personal jurisdiction for lack of service over a named defendant. *Id.* at 525. Because the trial court had neither severed nor dismissed the claims against the parties over whom jurisdiction had not been obtained, the judgment against the defendants over whom jurisdiction had been obtained was interlocutory. *Id.* Because the judgment was not final, the cause was remanded to the trial court for further proceedings. Here, Flojo was not a named defendant in the 1979 case. Even is the 162nd District Court lacked jurisdiction over Flojo despite its alter ego status, its judgment resolved all issues involving all parties named in the suit. Thus, the Walker judgment was a final judgment against the named parties, including Holloway and Robbie.

Maury v. Turner also is inapplicable to this case because there the plaintiff sued "the unknown owner" of certain real property. *Maury v. Turner*, 244 S.W. 809, 812 (Tex. Comm'n App. 1922, judgm't adopted). The plaintiff's suit was not the type authorized by statute to be maintained against unknown persons. *Id.* Absent statutory authority for the plaintiff's suit, the trial court lacked jurisdiction over the case, and the judgment was void. *Id.* The case of *Commonwealth Bank & Trust Co. v. Heid Bros.*, 52 S.W.2d 74 (Tex. Comm'n App. 1932, judgm't adopted), dealt with a certified question from the El Paso Court of Appeals concerning whether the plaintiff's lawsuit could be maintained in Bexar County against Heid Brothers, a corporation domiciled in El Paso County, by virtue of the

exceptions to statutory provisions concerning exclusive venue. The court ruled that Heid Brothers and the other defendant were jointly and severally liable to the plaintiff bank, making Heid Brothers a proper and necessary party to the bank's lawsuit. *Id.* at 75. The court then concluded that the district court of Bexar County had jurisdiction over Heid Brothers. *Id.* at 76.

Even if the trial court erroneously included Flojo in the Walker judgment, such would not require reversal of the judgment as to Holloway or Robbie. Where the error affects only a part of the matter in controversy and that part is clearly separable without unfairness to the parties, the judgment shall be reversed and a new trial ordered *only* as to that part affected by such error. Tex. R. App. P. 81(b)(1). Here, the liability of Flojo, as Holloway's alter ego, was strictly derivative. Although a reversal as to Holloway would require a reversal as to Flojo, the reverse is not true. Were we to reverse only as to Flojo, Holloway's liability would be unaffected. Likewise, Robbie's liability in the 1979 case is not dependent on Flojo's liability. Reversal of that part of the judgment concerning Flojo clearly would be separable without unfairness to the parties. We overrule Holloway's and Robbie's second points of error.

Because Flojo did not adopt the amended third motion for partial summary judgment, we hold that it cannot rely on that motion for reversal on appeal. *See Teer v. Duddleston*, 664 S.W.2d 702,703 (Tex. 1984) (trial court cannot grant summary judgment for party who has not properly moved for summary judgment). Further, as previously stated, Flojo submitted no evidence to the trial court that it regained its corporate privileges and that it is, thus, entitled to challenge the Walker judgment in a Texas court. Finally, to the extent that Flojo attempted to collaterally attack the judgment, a defendant who is not served and does not appear may not

attack the verity of a judgment in a collateral proceeding; the jurisdictional recitals import absolute verity. *See Akers v. Simpson*, 445 S.W.2d 957, 959 (Tex 1969). As previously stated, the Walker judgment states that the court had jurisdiction over the parties. We hold that the recitals rendering judgment against Flojo conclusively demonstrate that it was a party to the suit. We overrule Flojo's second point.

BANKRUPTCY COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the fifth point, Holloway contends that the trial court erred in denying his motion to supplement the summary-judgment record with the bankruptcy court's findings of fact and conclusions of law in the bankruptcy case. Holloway argues on appeal that the findings and conclusions were necessary summary-judgment evidence to determine which issues decided by the bankruptcy court are binding for purposes of collateral estoppel.

Although appellees asserted collateral estoppel as a ground for summary judgment, we have held that summary judgment was proper on the ground of claim preclusion, *i.e.*, res judicata. Thus, the trial court's denial of Holloway's request did not adversely affect his position because the bankruptcy court's findings and conclusions were irrelevant to a determination of the applicability of res judicata to Holloway's bill of review. We overrule Holloway's fifth point.

PERMANENT INJUNCTION

In the sixth point, Holloway argues that the trial court erred in permanently enjoining him from further challenging the validity of the Walker judgment. Holloway's point of error assumes that this Court will reverse the trial court's granting of appellees' amended summary-judgment motion. Holloway states in his brief that "[i]t would be inconsistent and conflicting to reverse this cause to permit trial of the bill of review and at the same time leave in place the permanent injunction prohibiting [Holloway] from proceeding in that cause." Overruling the first point of error disposes of this point. The injunction does not prohibit Holloway from appealing this case. Holloway gives no reason why he should be permitted to initiate or to continue other attacks on the Walker judgment in other proceedings, which is what the injunction prohibits. We overrule Holloway's sixth point of error.

We affirm the trial court's judgment.

/s/ Annette Stewart
ANNETTE STEWART
JUSTICE

Publish
Tex. R.App. P. 90
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APPENDIX B

Order issued August 27, 1992

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00571-CV

PAT S. HOLLOWAY, ET AL., Appellants

V.

MICHAEL G. STARNES, ET AL., Appellees

ORDER

Before Justices Stewart, Baker, and Maloney

It is **ORDERED** that the motions for rehearing filed by appellants Pat S. Holloway, Robbie Holloway, and Flojo Trading Corporation are **DENIED**.

/s/ Annette Stewart
ANNETTE STEWART
JUSTICE

APPENDIX C

RECEIVED
FEB 11 1993

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February, 10, 1993

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D-2954 pg 1 of 2

THE SUPREME COURT OF TEXAS
P.O BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

RE: Case No. D-2954

Style: PAT S. HOLLOWAY ET AL.
v. MICHAEL G. STARNES ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced applications (3) for writ of error with the notation, "Writ Denied". Justice Enoch not sitting. Respondent's motion to extend length of brief is overruled.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

APPENDIX D

RECEIVED
MAR 25 1993

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 24, 1993

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RE: Case No. D-2954

Style: PAT S. HOLLOWAY ET AL.
v. MICHAEL G. STARNES ET AL.

THE SUPREME COURT OF TEXAS

P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

Dear Counsel:

Today, the Supreme Court of Texas overruled all the motions for rehearing in the above referenced application/s for writ of error. (Justice Enoch not sitting.)

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin
Blanca Morin, Deputy

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PAT S. HOLLOWAY, Individually,	§	
and wife BRENDA HOLLOWAY,	§	
Individually,	§	
HUMBLE EXPLORATION COMPANY	§	
INC., AND STERLING PIPELINE	§	
COMPANY, and DON NAVARRO,	§	
Trustee of the Estates of	§	
HUMBLE EXPLORATION COMPANY,	§	
INC., and PAT S. HOLLOWAY	§	
	§	
Plaintiffs,	§	
VS.	§	
	§	
JUDGE DEE BROWN WALKER,	§	
JUDGE OF THE 162ND JUDICIAL	§	
DISTRICT COURT OF DALLAS	§	
COUNTY TEXAS	§	
G. H. KELSOE, JR., R. JACK	§	
AYRES, JR., Individually, and	§	
as a Professional Corporation,	§	
JOHN WRIGHT	§	
WHITLEY R. SESSIONS, J. R.	§	
HURT, JANE H. BROWNING,	§	
Individually as Co-Independent	§	NO. CA-3-
Executrix & as Co-Trustee,	§	82-1846-H
of the ESTATE OF	§	
WILLIAM W. BROWNING JR.,	§	
Deceased, MICHAEL G. STARNES,	§	
Individually as Co-Independent	§	
Executor of the ESTATE OF	§	

WILLIAM W. BROWNING, JR.,	§
Deceased, and as Trustee for	§
Kathryn Louise Browning Cook,	§
Averille Adams Browning	§
William Webb Browning III	§
Winifred Fallon Browning	§
and Robert Holland Browning;	§
CATHERINE AGNES LAND STARNES	§
Individually; KATHRYN LOUISE	§
BROWNING COOK, Individually,	§
AVERILLE ADAMS BROWNING,	§
Individually, WILLIAM WEBB	§
BROWNING III, ROBERT HOLLAND	§
BROWNING, Individually, and	§
WINIFRED FALON BROWNING,	§
Individually, and FAIRWAY LAND	§
COMPANY, FAYETTE OIL	§
COMPANY, AMCAP PETROLEUM	§
ASSOCIATES-1977, AMCAP	§
PETROLEUM ASSOCIATES-1979B,	§
AMERICAN HAWK OIL COMPANY,	§
AMERICAN FALCON OIL COMPANY,	§
AMERICAN EAGLE OIL COMPANY,	§
AMERICAN HERON OIL COMPANY,	§
AMERICAN WREN OIL COMPANY,	§
AMERICAN RAVEN OIL COMPANY,	§
HARPER OIL COMPANY and	§
JEFFREY WEISS and DONALD	§
GINSBERG, Individually, and as General	§
Partners of AMERICAN PETROLEUM	§
PARTNERS	§
	§
Defendants.	§

PLAINTIFFS' SECOND AMENDED COMPLAINT AND APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF

PAT S. HOLLOWAY, Individually, and wife BRENDA HOLLOWAY, Individually ("HOLLOWAY"), HUMBLE EXPLORATION COMPANY, INC. ("HUMBLE"), STERLING PIPELINE COMPANY ("STERLING"), AND DON NAVARRO ("NAVARRO"), Trustee of the Estates of Humble Exploration Company, Inc., and PAT HOLLOWAY, Plaintiffs herein, file this their Second Amended Complaint and Application for Injunctive and Declaratory Relief, complaining of JUDGE DEE BROWN WALKER, individually and in his official capacity as JUDGE OF THE 162nd JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, G. H. KELSOE, JR., R. JACK AYRES, JR., Individually, and as a professional corporation, JOHN WRIGHT, WHITLEY R. SESSIONS, J. R. HURT, JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, MICHAEL G. STARNES, Individually and as Co-Independent Executor of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee for Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, and Robert Holland Browning; CATHERINE AGNES LAND STARNES, Individually; KATHRYN LOUISE BROWNING COOK, Individually, AVERILLE ADAMS BROWNING, Individually, WILLIAM WEBB BROWNING III, Individually, and ROBERT HOLLAND BROWNING, Individually, ("THE BROWNINGS"); FAIRWAY LAND COMPANY, FAYETTE OIL COMPANY, AMCAP PETROLEUM ASSOCIATES-1977, AMCAP PETROLEUM ASSOCIATES-1979B, AMERICAN HAWK OIL

COMPANY, AMERICAN FALCON OIL COMPANY, AMERICAN EAGLE OIL COMPANY, AMERICAN HERON OIL COMPANY, AMERICAN WREN OIL COMPANY, AMERICAN RAVEN OIL COMPANY, HARPER OIL COMPANY, and JEFFREY WEISS and DONALD GINSBERG, Individually and as General Partners of AMERICAN PETROLEUM PARTNERS, (hereinafter the "APP ENTITIES"), Defendants herein, and for their complaint would show the Court:

PARTIES

1. Plaintiffs Pat S. Holloway and Brenda Holloway are residents of and domiciled in Lee County, Texas. Plaintiffs Humble Exploration Company, Inc., and Sterling Pipeline Company are Texas corporations with their corporate offices in Dallas, Dallas County, Texas.

2. Don Navarro, Trustee of the Estates of Humble Exploration Company, Inc. and Pat S. Holloway, was appointed as Trustee by the United States Bankruptcy court, with his office in Dallas, Dallas County, Texas.

JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked pursuant to provisions of 28 U.S.C. §§ 1331, 1343(3), and 2201. This complaint is based upon 42 U.S.C. § 1983 *et seq.*, this being a suit in equity and at law which is authorized by law to be brought to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured by the Constitution and the laws of the United States or by any act of Congress providing for equal rights of citizens. The rights here sought to be redressed are rights guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Plaintiffs further invoke the pendent jurisdiction of this Court to consider their state law causes of action which arise out of the same common nucleus of operative facts that have given rise to Plaintiffs' claims under 42 U.S.C. § 1983, the Fourteenth Amendment to the United States Constitution.

6. Venue is proper in the Northern District of Texas pursuant to 28 U.S.C. § 1965(a).

FACTUAL ALLEGATIONS

7. The Defendants hereinabove named, entered into a conspiracy, the full extent of which is unknown, both individually and jointly between themselves and with other persons.

190. Plaintiffs further seek a judgment and an award Defendants for reasonable attorney's fees and court costs pursuant to 42 U.S.C. § 1988, and for attorney's fees and court costs that have been incurred to date in securing the removal of the wrongful receiver.

COUNT SEVEN: DECLARATORY JUDGMENT

191. Plaintiffs hereby adopt and reallege all of the allegations of paragraph 1-190.

192. Plaintiffs, in the alternative, and in addition to the foregoing, and without waiving any of the foregoing, seek a declaratory judgment pursuant to 28 U.S.C. § 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

193. On January 17, 1980, Plaintiffs and Defendants entered into the Stipulation and Agreement which became part of the Order of the Bankruptcy Court in order to remand the cause of action between the parties to the state trial level.

194. On June 8, 1982, Defendants Browning, Kelsoe and Ayres with full knowledge of their Stipulation and Agreement and the subsequent order of the Bankruptcy Court, sought action in violation thereof from the state district court, Defendant Judge Walker presiding.

195. The acts of Defendants Browning, Kelsoe, and Ayres and the subsequent actions of Defendant Judge Walker, interfered with the exercise of Plaintiffs' rights, to Plaintiffs' detriment, in both the Stipulation and Agreement and subsequent court order and thus denied Plaintiffs the benefit of said Stipulation and Agreement.

196. Plaintiffs are entitled to a judgment declaring the effect of the Bankruptcy Court's orders which incorporated the Stipulation and Agreement to be a complete and conclusive bar against any acts by Defendants contrary to the terms of said order.

197. The acts of the named Defendants have individually and jointly deprived Plaintiffs of their constitutional rights of due process and to a fair trial.

198. Plaintiffs are entitled to a declaratory judgment that the final judgment entered by Defendant Judge Walker on August 26, 1982, and all other orders entered by Defendant Judge Walker in cause Nos. 82-5742-I and 79-9623-L are void and of no force and effect.

WHEREFORE, Plaintiffs demand that the Court adjudge: that the effect of the Bankruptcy Court's judgment rendered by the United States Bankruptcy Court, Cause Nos. BK 379-00664 G, BK 379-00665 G on the docket of said court constitutes a complete and conclusive bar against the assertions made by the Defendants in Cause Nos. 82-5742-I and 79-9623-1, and/or that the final judgment and all other orders entered by Defendant Judge Walker are void and of no force and effect and/or order further equitable and injunctive relief as this court deems appropriate and necessary to correct the conditions complained of herein.

PLAINTIFFS' SECOND AMENDED COMPLAINT AND APPLICATION FOR DELCARATORY AND INJUNCTIVE RELIEF, p. 64 and p. 65

APPENDIX F

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
APR 18 1985
NANCY HALL DOHERTY, CLERK
By /s/ illegible
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

APR 22 REC'D

PAT S. HOLLOWAY, et al.	*	
	*	
Plaintiffs	*	
v.	*	Civil Action No.
	*	3-82-1846-H
JUDGE DEE BROWN	*	
WALKER, et al.	*	
	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant R. Jack Ayres, Jr.'s Motion to Clarify, Motion to Reconsider and in the Alternative, Motion to Certify, filed March 21, 1985, and Plaintiffs' Response, filed April 12, 1985.

By Memorandum Opinion and Order of March 11, 1985, the Court granted Defendant Ayres' Motion for Summary Judgment as it related to Plaintiffs' procedural due

process claim and denied it as it addressed a substantive due process claim for the deprivation of a constitutional right to a fair trial.

Motion to Reconsider

Defendant Ayres seeks the reconsideration of the previous order and the grant of a total summary judgment. He argues that the claim of a trial before a biased decision-maker is one of procedural, and not substantive, due process. Upon further examination, the Court agrees. * * * *

* * * * appears once in the fourteenth amendment, can be simultaneously violated and not violated by the same acts. Needless to say, any purpose served by *Hudson* would be eviscerated by such an arrangement.

Without expressing an opinion on the merits of the allegations in this case, the availability of a substantive due process remedy will encourage a staggering volume of constitutional challenges by disgruntled civil litigants, from whom charges of bias, bad faith and other opprobrious epithets of malice are commonplace. *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). Such claims are better relegated to the normal corrective processes of the state courts.

Pendent Claims

Plaintiffs also assert several pendent claims, including allegations of negligent and wrongful receivership. The viability of many of these causes of action asserted by Plaintiffs is in serious doubt given recent actions by the state courts on Plaintiffs' appeal. In *United Mine Workers v. Gibbs*, the Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. 715, 726 (1966). This rule has been followed often in this circuit. *See Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980); *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111 (5th Cir. 1979). This general rule, however, is not absolute. the oft-times divergent goals of state and federal comity, judicial economy, convenience and fairness should be considered in exercising what is a matter of discretion. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1319 (5th Cir. 1983).

The court is of the opinion that the viable pendent claims, if any, should be heard in the state courts. The ultimate determination of the ownership of the property underlying the claims will eventually come from the state courts. The federal courts have previously indicated a desire to abstain from adjudicating the validity and propriety of the actions of the receiver appointed by the state court. *See Humble Exploration Company, Inc. v. The Browning Interests*, Adv. No. 382-0864-G (Order of October 5, 1982). No motions addressed to the substance of the pendent claims have been filed or considered by this Court. An adequate state forum is available.

The Court finds that the pendent claims were not filed in federal court "in intentional disregard of jurisdiction", *see* Tex.Rev.Civ.Stat.Ann. art. 5539a (Vernon 1958). Article 5539a governs the refiling in state court and is liberally construed in favor of preserving Plaintiffs' claims. *Griffen v. Big Spring, I.S.D.*, 706 F.2d 645, 650-51 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 525 (1983).

Accordingly, the court is of the opinion that Defendant Ayres' Motion to Reconsider should be and hereby is, GRANTED; the Court's Memorandum Opinion and Order of March 11, 1985, is MODIFIED consistent with this Opinion; all Defendants' Motions for Summary Judgment are GRANTED and Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED WITH PREJUDICE; and Plaintiffs' pendent claims are DISMISSED WITHOUT PREJUDICE to the timely refiling of same in state court.

SO ORDERED.

DATED: April 18, 1985.

/s/ illegible
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

APPENDIX G

No. 8066

BENNIE C. JAEHNE; HERMAN JAEHNE; TED R. FERGUSON; JOE W. HOLT; FLOJO TRADING CORPORATION; MARCY HOLLOWAY; CATHERINE GAIL HOLLOWAY; PATRICK LEE HOLLOWAY; BRENDA HOLLOWAY; PAT S. HOLLOWAY as Trustee of CATHERINE GAIL HOLLOWAY; PAT S. HOLLOWAY as Trustee of of PATRICK LEE HOLLOWAY; PAT S. HOLLOWAY; DON NAVARRO,as Trustee of PAT S. HOLLOWAY, HUMBLE EXPLORATION COMPANY, INC.(Now HECI Exploration Company) and STERLING PIPELINE COMPANY	)	IN THE DISTRICT COURT OF
Plaintiffs,	)	
v.	)	LEE COUNTY, TEXAS
MICHAEL G. STARNES, Individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the	)	

BROWNING CHILDRENS' TRUSTS; JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the Estate of W. BROWNING, JR., deceased; G.H. KELSOE, JR., and R. JACK AYRES, JR., Individually and as a professional corporation; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING; DEE BROWN WALKER; JOHN WRIGHT; WHITLEY R. SESSIONS; J.R. HURT; ERIC MILLER, and SOUTHWEST MEDIA CORPORATION	)	
Defendants.	)	21ST JUDICIAL DISTRICT

FILED
JUN 17 1985 2:58 PM
/s/ illegible
DISTRICT CLERK
LEE COUNTY, TEXAS
BY /s/ illegible
DEPUTY

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW BENNIE C. JAEHNE, HERMAN JAEHNE, TED R. FERGUSON, JOE W. HOLT, FLOJO TRADING CORPORATION, MARCY HOLLOWAY, CATHERINE GAIL HOLLOWAY, PATRICK LEE HOLLOWAY, BRENDA HOLLOWAY, PAT S. HOLLOWAY as Trustee of CATHERINE GAIL HOLLOWAY, PAT S. HOLLOWAY as Trustee of PATRICK LEE HOLLOWAY, PAT S. HOLLOWAY (hereinafter "Holloway"). DON NAVARRO, as trustee of PAT S. HOLLOWAY (hereinafter called the "Trustee", HUMBLE EXPLORATION COMPANY, INC. (now HECI Exploration Company but hereinafter called "Humble") and STERLING PIPELINE COMPANY

PLAINTIFFS' ORIGINAL PETITION - p. 1

Count Three

In Count Three Marcy Holloway, Pat S. Holloway as Trustee and as Guardian for Catherine Gail Holloway, and Pat S. Holloway as Trustee and as Guardian for Patrick Lee Holloway, who also were *not* named or made parties to any of the proceedings which resulted in the Void Judgment in favor of the Browning Interests seek to quiet their title to and to remove the encumbrance of the Void Judgment from, real

property and estates and interests in real property located in Lee, Washington, and Fayette Counties, Texas, consisting primarily of all overriding royalty interests and working interests in oil and gas leases covering lands in such counties which were sold and assigned to them by Humble and which stand of record in their names in such counties. They also seek recovery of their damages.

Such Plaintiffs' titles have been clouded by the Browning Interests' claims based on the Void Judgment to which such Plaintiffs were never made parties.

Count Four

In Count Four Holloway, Brenda Holloway and the Trustee seek to recover title to, and to quiet title to and remove encumbrance from, certain real property interests in Lee County, Texas and elsewhere as against the Browning Interests including (i) the 805 acre farm in Lee County, Texas, 200 acres of which is claimed as the homestead of Holloway and wife Brenda Holloway, (ii) all overriding royalty interests and working interests in Lee County, Texas and elsewhere conveyed by Humble to Holloway or the Trustee, and (iii) the real property interests devised to Holloway by his father. Brenda Holloway claims homestead rights in the 200 acre homestead and community property interests in all working interests conveyed by Humble to the Trustee. The Trustee does not acknowledge the homestead rights of Holloway and Brenda Holloway. Brenda Holloway was not named as a defendant or otherwise made a party to the Void Judgment which is void as to her for such reason as well as the other grounds for relief asserted by her and Holloway.

Count Five

In Court Five, Plaintiffs Brenda Holloway and Pat S. Holloway seek, pursuant to Sections 23.001 and 23.002 of the Texas Property Code and Section 5.42 of the Texas Family Code, a partition of community real property interests located in Lee County, Texas and elsewhere consisting of all oil and gas lease working interests acquired by the Trustee from Humble since November, 1982 with commingled and community property funds of Brenda Holloway and Pat S. Holloway or his estate. Herein Plaintiff Brenda Holloway also seeks to quiet her title to all real property interests to be partitioned to her by the Court as against all claims of the Browning Interests thereto, including but not limited to those based on the Void Judgment. The Trustee is joined as an involuntary plaintiff in this count to assure that the estate of Pat S. Holloway as well as the Browning Interests will be bound by the judgment of partition to be rendered herein.

Count Six

In Count Six Pat S. Holloway and the Trustee, as the solle legal and beneficial holder or holders al all voting rights in all outstanding stock of Humble and Sterling, seek to recover for the use and benefit of Humble and Sterling as against the Browning Interests the title to, and to quiet title to, and remove encumbrance from, real property and estates and interests * * * *

Count Fifteen

In Count Fifteen all Plaintiffs seek a declaratory judgment that the Void Judgment is a void judgment and, that the underlying claims of the Browning Interests are without merit as to any of Plaintiffs. Certain Plaintiffs also seek herein ancillary injunctive relief.

V.
GROUNDS FOR RELIEF

1. The following Plaintiffs were never served with process, named as defendants, or in any other way made parties in the Dallas County lawsuit which resulted in the Void Judgment:

Bennie C. Jaehne
Herman Jaehne
Joe W. Holt
Flojo Trading Corporation
Ted R. Ferguson
Brenda Holloway
Marcy Holloway
Catherine Gail Holloway
Patrick Lee Holloway
Pat S. Holloway, Trustee for Catherine Gail Holloway
Pat S. Holloway, Trustee for Patrick Lee Holloway

None of the foregoing Plaintiffs except Flojo Trading Corporation was even named in the Void Judgment. Therefore, the Void Judgment is void as to them upon such grounds, in addition to the other grounds for relief set forth below. Both the Void Judgment and the underlying claims of the Browning Interests on which the Void Judgment is based have created clouds and encumbrances on all of the

titles of these Plaintiffs, and have caused them damages, for which they seek relief herein on all grounds for relief set forth herein.

2. Throughout the proceedings resulting in the Void Judgment, Plaintiffs Holloway, Humble and Sterling were deprived of procedural due process under Article 1, Section 19, of the Texas Constitution, by being deprived of: (i) advance notice of hearings; (ii) the opportunity to appear and argue to the court before entry of orders; (iii) the opportunity to be represented by their counsel; (iv) the opportunity to present their own witnesses and evidence; (v) the opportunity to cross-examine witnesses; (vi) sufficient time to prepare for hearings and the trial of the case; (vii) access to their own records necessary to present their defense; and (viii) other fundamental rights of procedural due process. As a result of such violations and deprivations of due process as guaranteed by the Texas Constitution, the Void Judgment is void and a nullity and subject to collateral attack in this suit.

3. Throughout the proceedings, both prior to and during trial and in the entry of the Void Judgment, former Judge Dee Brown Walker acted with bias and partiality against Plaintiffs Holloway and Humble and totally deprived them of a fair trial, or even any vestige of a fair trial. Defendant Walker was in fact biased and in fact did not give Plaintiffs a fair trial. Plaintiffs were entitled to a fair trial before an unbiased and impartial judge as a matter of constitutional due process under both the Due Process Clause of the Texas Constitution, Article 1, Section 19, and under Article V, Section 11, of the Texas Constitution and Article 15 of the Texas Revised Civil Statutes, both as implemented by Canon 3C of the Texas Code of Judicial Conduct. By reason of his bias and partiality, Defendant Walker was disqualified and had no capacity to act as judge in the case

or to render judgment therein. Therefore, the Judgment rendered by him is void and a nullity, and subject to collateral attack in this suit.

4. In addition to being biased and failing to give Plaintiffs a fair trial, Defendant Walker and the other Defendants entered into an illegal conspiracy among themselves to deprive Holloway of, and pursuant to such conspiracy did deprive him of, all his worldly belongings, including his residence in Dallas, his home and farm in Lee County, Texas; all real property devised to him by his father; his two companies; Humble and Sterling, and all of his personal oil and gas properties, and other real estate and property he has accumulated over his lifetime. In addition to divesting Holloway of all his property, the Void Judgment rendered a money judgment against him in the amount of $72,000,000.00. Pursuant to such illegal conspiracy, Judge Walker in fact and in law acted as counsel and as agent of and for the other Defendants while purporting to be a judge in this case, in violation of Section 11 of Article V of the Texas constitution. By reason thereof, Judge Walker was disqualified to act as judge in the case or to render judgment therein; hence, the proceedings were totally without due process of law; and the Void Judgment is void and a nullity, and therefore subject to collateral attack in this suit.

5. The Void Judgment was obtained by the fraud and other wrongful acts of the Defendants which prevented Plaintiffs Holloway, Humble and Sterling from presenting their defenses, in fraud of such plaintiffs' rights and in violation of such Plaintiffs' constitutional rights of procedural due process under the Due Process Clause of the Texas Constitution. By reason thereof the Void Judgment is void and a nullity and subject to collateral attack in this suit.

PLAINTIFFS' ORIGINAL PETITION-p. 13, p. 14, & p. 15

APPENDIX H

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 28 1985
NANCY HALL DOHERTY, CLERK
BY /s/ illegible
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANE H. BROWNING, et al.	*	
Plaintiffs	*	
v.	*	Civil Action No.
	*	3-83-0380-H
DON NAVARRO, et al.	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the court on Plaintiffs' Second Motion for Order in Aid of Partial Judgment, filed May 10, 1985; Defendant Holloway's Response, filed May 17, 1985; Response of Defendant Holloway to Court's Order, filed June 6, 1985; Plaintiffs' Report of Conference and Amended Second Motion, filed June 7, 1985; Trustee's Report of Conference, filed June 10, 1985; Motion of Defendant Holloway to Reconsider, or in the Alternative to Clarify its Opinion or in the Alternative to Certify, filed June 11, 1985; Defendant Holloway's Supplemental Brief, filed June 18, 1985; Plaintiffs' Reply to Motion for Reconsideration, filed

June 21, 1985; and Defendant Holloway's Response to Plaintiffs' Amended Second Motion, filed June 24, 1985.

As usual, the waters in this misbegotten kettle boil over. Once again, the Court will attempt to address the issues that cause the consternation.

On March 21, 1985, this Court filed a Memorandum Opinion and Order, addressing Motions for Summary Judgment after remand from the United States Court of Appeals for the Fifth Circuit, 743 F.2d 1069 (5th Cir. 1984). The issue before the Court was the appropriateness of the only relief that Plaintiffs sought at that time -- the provision by the Trustee of adequate security for Plaintiffs' state court judgment during appeal or, failing that, the turnover of the property subject to the judgment. At that time, the court granted Plaintiffs' Motion, holding that they were entitled to either security pursuant to state law or the fruits of the judgment.

Although the Trustee vigorously opposed such relief in the past, he did not seek leave to appeal this ruling, but rather indicated his desire to facilitate an orderly turnover of the property under his supervision to Plaintiffs pursuant to the state court judgment. A partial judgment was entered by the Court on April 2, 1985, reflecting the parties' understanding. The Trustee and Plaintiffs subsequently reached agreement on the form of an additional order in aid of judgment, covering the turnover of additional properties, which was filed by the Court on April 25, 1985.

Plaintiffs have now moved for a Second Order in Aid of Partial Judgment, seeking the turnover of certain real property (Holloway Ranch; 5840 Westgrove, Dallas; Pecan Farms; Baca County, Colorado Interests; Interest in Hinds Survey, Lee County), six vehicles and a vast quantity of oil

and gas properties detailed in the Schedules appended to the proposed order. The Trustee concurs with the form of the proposed order.

Defendant Holloway vigorously protests the turnover of certain property in Plaintiffs' Second Motion as not being covered by the state court judgment or as being subject to a community property/constructive trust claim of his wife Brenda. On June 17, 1985, Holloway commenced litigation in the 21st Judicial District Court of Lee County, styled *Bennie C. Haehne, et al. v. Starnes*, No. 8066 and secured a Temporary Restraining Order purporting to prohibit any of the plaintiffs herein from receiving any property from the Trustee, named as an involuntary plaintiff. It appears that the property covered by the TRO is that sought to be turned over by further order of this Court. The ultimate relief sought in the *Jaehne* litigation is the recovery of title by certain persons allegedly not made parties to the earlier state court action, the partition of certain community property interests, damages for wrongful receiverships, damages for wrongful enforcement of the judgment, a declaratory judgment that Holloway and Humble owe nothing to the Brownings and that the state court judgment is void, damages for malicious prosecution, slander, libel and invasion of privacy.

This Court has authorized and directed the Trustee to turn over to Plaintiffs all of the property covered by the state court judgment, in lieu of posting a supersedeas bond. The Court will not, however, function as Sheriff in directing the execution on various items of property. If the Trustee feels confident, as he indicates, that certain property can be safely conveyed as being clearly subject to the state court judgment, he should so proceed. This Court will not, however, immunize the parties from any errors in judgment.

Resolution of the issues raised by Holloway in *Jaehne* regarding conflicting title may be an arduous and lengthy process involving parties beyond those to the instant suit. The issues to be resolved are largely local in character. The determination by this Court of the identity of property within the scope of the state court judgment would involve a grueling expedition by a court with only the most tenuous jurisdictional basis. Accordingly, the Court hereby **ABSTAINS** in favor of the courts of the State of Texas from the resolution of any issues regarding the identity of or conflicting claims to title to assets subject to a constructive trust by the Amended Judgment signed November 11, 1982, by the 162nd Judicial District Court of Dallas County, Texas in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

To summarize, the Trustee is directed to turn over and deliver to Plaintiffs all remaining assets in the possession of the Trustee, considered by the Trustee and Plaintiffs to be subject to the constructive trust imposed by the state court. To the extent that there are disputes as to the identity of or conflicting claims to any such property, the claimants may proceed in a court of competent jurisdiction to adjudicate title to said property in the possession of Plaintiffs. Accordingly,

* * *

Accordingly, all relief not heretofore granted is **DENIED**, and this case is **DISMISSED**.

SO ORDERED.

DATED: June 28, 1985.

/s/ Barefoot Sanders
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

Certified a true copy of an instrument
on file in my office on 7/11/85
NANCY HALL DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By /s/ illegible Deputy

APPENDIX I

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
JUL 16 1985
NANCY HALL DOHERTY, CLERK
BY /s/ illegible
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANE H. BROWNING, et al.	*	
Plaintiffs	*	
v.	*	Civil Action No.
	*	3-83-0380-H
DON NAVARRO, et al.	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Plaintiffs' Motion to Amend Second Order, to Reconsider, for Partial New Trial and for Injunctive Relief, filed July 5, 1985, and the Trustee's Reply, filed July 9, 1985.

Upon consideration of the submissions of the parties, the Court is of the opinion that Plaintiffs' Motion should be, and hereby is, **GRANTED** as follows.

The paragraph on page nine of the June 28, 1985, Memorandum Opinion and Order (beginning "Nor can . . .") is **DELETED**, and the **DISMISSAL** of the case is hereby

VACATED. A trial setting and associated deadlines on Plaintiffs' damages claims against the Trustee will be forthcoming shortly.

On page three of the same Opinion, the paragraph beginning "This Court has authorized . . ." is **DELETED**, and the following language is substituted:

This Court has authorized and directed the Trustee to turn over to Plaintiffs all of the property covered by the state court judgment in lieu of posting a supersedeas bond. The Trustee has identified those items of property in Schedules 1 and 2, attached to the Second Order, as being covered by the state court judgment. He is thus directed to promptly execute and deliver the necessary documents to accomplish the turnover of these interests.

Of course, this Order does not foreclose any rights of any individuals not parties to this action who may assert superior title to or interest in any of the property. Such claims may be asserted against the Browning Interests as readily as against the Trustee. Likewise, if the Trustee or Holloway should subsequently discover any property which is, for reasons other than the validity of the state court judgment, rightfully that of the Estate or of the debtor, this order does not foreclose litigation to resolve that issue. Such claims have not been previously raised in this forum and the Court sees no reason why any such litigation should be conducted here. The Court is not purporting to vest Plaintiffs with clear fee simple title, but only with possession of the assets subject to their judgment.

The fourth sentence of the first full paragraph on page four is **AMENDED** to read: "Accordingly, this Court will **ABSTAIN** in favor of the courts of the State of Texas from the resolution of any issues regarding conflicting claims to

title to assets subject to a constructive trust by the Amended Judgment signed November 11, 1982, by the 162nd Judicial District Court of Dallas County, Texas, in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* on the basis of claims other than those adjudicated in this Court by parties to this action. *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 470 (1940).

SO ORDERED.

DATED: July 16, 1985.

/s/ Barefoot Sanders
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

APPENDIX J

PLAINTIFFS' AMENDED THIRD MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

FILED: OCTOBER 19, 1990

(Stamp Illegible)

NO. 86-7704-I
NO. 89-6582-I
NO. 89-10016-I

PAT S. HOLLOWAY, and BRENDA HOLLOWAY, Individually, HUMBLE EXPLORATION COMPANY, INC., STERLING PIPELINE COMPANY, FLOJO TRADING CORPORATION AND ROBBIE HOLLOWAY	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	
MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDRENS' TRUSTS and as Special Trustee;	§	
JANE H. BROWNING, Individually and as Co-Independent Executrix and	§	DALLAS COUNTY, TEXAS

Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; WINIFRED FALLON BROWNING VAUGHN; R. JACK AYRES, JR., Individually and LAW OFFICES OF R. JACK AYRES, JR., P.C., a corporation	§	162ND JUDICIAL
Defendants.	§	DISTRICT

PLAINTIFFS' AMENDED THIRD MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

Now come Plaintiffs Pat S. Holloway and Brenda Holloway with this their Amended Third Motion for Summary Judgment and Brief in Support thereof, by which they would show the Court as follows:

I.

The Amended Judgment of November 11, 1982, in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas, Texas, styled *Jane H. Browning, et al. v. Pat S.*

Holloway, et al., purports to impose a constructive trust upon 100% of the issued and outstanding shares of stock of Flojo Trading Corporation, purports to impose a constructive trust upon and award legal and equitable title to all property and mineral interests owned, controlled, or held by Flojo Trading Corporation, purports to impose a constructive trust upon all property, assets, and other things of value owned, controlled, held or claimed by Flojo Trading Corporation, and further purports to impose joint and several liability upon Flojo Trading Corporation from damages in the amount of SEVENTY MILLION DOLLARS ($70,000,000.00)

II.

Flojo Trading Corporation was not named as a defendant, was not served with citation or other process, and did not appear in any fashion at any time prior to entry of judgment in Cause No. 79-9623-I in the 162nd Judicial District court of Dallas County, Texas. Said judgment in Cause No. 79-8623-I does not recite that Flojo Trading Corporation was a defendant in that cause.

III.

The legal and beneficial stockholders of Flojo Trading Corporation were not named as defendants, were not served with citation or other process, and did not appear in any fashion at any time prior to entry of judgment in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas County, Texas. Said judgment in Cause No. 79-9623-I does not recite that any of the legal and beneficial stockholders of Flojo Trading Corporation were defendants in that cause.

IV.

The judgment in Cause No. 79-9623-I is therefore void as to Flojo Trading Corporation. Insofar as the judgment imposes joint liability and is indivisible, it is also void as to the defendants in Cause No. 79-9623-I, specifically Plaintiff in this cause Pat S. Holloway.

V.

In support of this motion, and pursuant to Rule 201 of the Texas Rules of Civil Evidence, Plaintiffs request that the Court take judicial notice of the Court's file in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* Plaintiffs further adopt and incorporate herein by reference the affidavit of Joe W. Holt which was previously attached to and incorporated in Plaintiffs' Third Motion for Partial Summary Judgment and Brief in this cause. A copy of said affidavit of Joe W. Holt is attached hereto as Appendix 1.

VI.

In further support of this motion, Plaintiffs submit the following authorities.

In a direct attack on a judgment, such as the Bill of Review brought in this cause, no presumptions are indulged in support of the judgment's validity. *Fender v. Moss*, 696 S.W.2d 410 (Tex. App. - Dallas 1985). As disclosed by the summary judgment evidence, namely the Court's file in Cause No. 79-9623-I and the affidavit of Joe W. Holt, Flojo Trading Corporation was never made a party, either by citation or appearance, to Cause No. 79-9623-I prior to entry of the Amended Judgment dated November 11, 1982. The

judgment against Flojo Trading Corporation is therefore void. See *Peralta v. Heights Medical Center*, 485 U.S. 80, 108 S.Ct. 896 (1988).

The Supreme Court of Texas held over a century ago that if a judgment is void as against one defendant and is indivisible in nature, then it is necessarily void as against other defendants named in the judgment. *Hulme v. Janes, Adm'r*, 6 Tex. 242, 55 Am. Dec. 774 (1851). That holding was followed in *Long v. Garnett*, 45 Tex. 400 (1876), as it has been consistently followed in the years since. See, e.g. *McLaren Rubber Co. v. Williams Auto Supply*, 81 S.W.2d 255 (Tex. Civ. App. - Eastland 1934).

The rationale, as applicable here, for such a holding is that a judgment of joint liability cannot be rendered in the absence of any party sought to be held liable. *Zodiac Corporation v. General Electric Credit Corporation*, 566 S.W.2d 341, 346 (Tex. Civ. App. - Tyler 1978). Put another way, if a trial court has not acquired jurisdiction over all of the parties affected by its judgment, then the judgment is void. *Danner v. Aetna Life Insurance Co.*, 496 S.W.2d 950 (Tex. Civ. App.- Ft. Worth 1973).

The judgment in Cause No. 79-9623-I as to joint and several liability for the $70,000,000.00 damage award is necessarily indivisible as to Flojo Trading Corporation and the other named defendants, including Pat S. Holloway. Since that judgment is void as to Flojo Trading Corporation, it is also necessarily void as to the other named defendants, including Pat S. Holloway. Likewise, the imposition of a constructive trust over the property, mineral interests, and other assets of the defendants, including Flojo Trading Corporation, is necessarily indivisible and therefore void as to all defendants in that cause, including Pat S. Holloway.

PREMISES, CONSIDERED, Plaintiffs respectfully pray the Court enter judgment that the Amended Judgment of November 11, 1982 in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas County, Texas, is void.

Respectfully submitted,

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State Bar No. 14196000

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ATTORNEYS FOR PLAINTIFFS
PAT S. HOLLOWAY AND
BRENDA HOLLOWAY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Amended Third Motion for Summary Judgment and Brief in Support Thereof has been sent by Federal Express to Mr. R. Jack Ayres and Mr. Thomas V. Murto, III, Law Officers of R. Jack Ayres, Jr., 4350 Beltway Drive, Dallas, Texas 75244-3110 and by certified mail, return receipt requested to the following counsel of record on this the 18th day of October, 1990:

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3811 Turtle Creek
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Dallas, Texas 75219

/s/ Scott A. Young
for Roy Q. Minton

AFFIDAVIT OF JOE W. HOLT

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME the undersigned authority on this day personally appeared Joe W. Holt who, being by me first duly sworn, on oath stated as follows:

1. My name is Joe W. Holt. I am over the age of 21 years and of sound mind, and I have never been convicted of a felony or other crime involving moral turpitude. I have personal knowledge of all matters stated herein and am competent to testify thereto.

2. At all times during 1982 I was both President of, and the registered agent for service of process for, Flojo Trading Corporation, a Texas corporation incorporated in 1979. I have been the only registered agent for service of process for such corporation since its incorporation.

3. Flojo Trading Corporation was neither named as a party or served with process in any way in either the case of *Jane H. Browning, et al. v. Pat S. Holloway, et al.*, Cause No. 79-9623-I or in the case of *Fairway Land Company, Inc. et al. v. Humble Exploration Company, Inc., et al.*, No. 82-5742-I in which various judgments were entered in the 162nd Judicial District Court of Dallas County, Texas.

4. Flojo Trading Corporation did not enter any appearance in either of such cases prior to the renditions of judgments therein nor was it represented by counsel in either of such cases in any of the proceedings prior to judgments therein.

5. At all relevant times the sole legal and beneficial stockholders of Flojo Trading Corporation were Bennie Jaehne, Herman Jaehne, Charlie Adams, Dean A. Johnson, III and myself. None of us was named as a Defendant in *Browning v. Holloway*, none of us was served with process therein, none of us appeared in such case and none of us was represented by counsel in such case.

Further affiant sayeth not.

/s/ Joe W. Holt
Joe W. Holt

SUBSCRIBED AND SWORN TO Before me on this the 17 day of September, 1986.

/s/ D.K. Jones Sallee

Notary Public, State of Texas

My Commission Expires: 11-25-1989

Printed Name of Notary: D.K. Jones Sallee

ENDORSEMENT ON INSTRUMENT NO. 86-7704-I
Pat S. Holloway, et al
vs.
Michael G. Starnes, et al
PLAINTIFFS' AMENDED THIRD MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF
Filed: October 19, 1990 BILL LONG, District Clerk
Dallas County, Texas /s/ _____,Deputy

APPENDIX I

Supreme Court, U.S.
FILED
JUL 23 1993
OFFICE OF THE CLERK

No. 92-2048

In The

Supreme Court of the United States

October Term, 1993

PAT S. HOLLOWAY AND ROBBIE HOLLOWAY,

Petitioners,

v.

JANE H. BROWNING, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Court Of Appeals District Of Texas At Dallas

RESPONDENTS' BRIEF IN OPPOSITION

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AMENDED LIST OF PARTIES

Catherine Agnes Land Starnes

Kathryn Louise Browning Cook

Averille Adams Browning Dawson

Winifred Fallon Browning Vaughn

NationsBank of Texas, N.A.,
f/k/a NCNB Texas National Bank, successor to FDIC, as Receiver for First RepublicBank Dallas, N.A., Successor to InterFirst Bank Dallas, N.A., Individually and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased

NationsBank Corporation (parent)

NationsBank, Texas, Corporation (parent)

NationsBank, Texas Bancorporation, Inc. (parent)

NationsBank Community Development Corp. (subsidiary)

NationsBank Housing Fund Development Corp. (subsidiary)

Browning Oil Corporation, HECI Exploration Company, Inc. and Sterling Pipeline Company have no parent or subsidiary companies. NationsBank Corporation has numerous subsidiaries in other states.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Jane H. Browning, et al.,[1] (the "Brownings") respectfully request that this Court deny the Petition for Writ of Certiorari by Pat S. Holloway ("Holloway") and Robbie Holloway ("Robbie") seeking review of the judgment of the Texas Court of Appeals for the Fifth Court of Appeals District in Dallas. That court's opinion in this case is reported at 840 S.W.2d 14.

JURISDICTION

The Court should decline to accept jurisdiction to review the judgment of the Texas court of appeals because the issues sought to be presented here were not timely and properly presented below.

STATEMENT OF THE CASE

The petition of Holloway and Robbie (collectively, the "Holloways") is a companion to the petition filed by Flojo Trading Corporation ("Flojo") in Cause No. 92-2049, *Flojo Trading Corp. v. Jane H. Browning, et al.*

---

[1] The Respondents are Jane H. Browning, Individually, as Co-Independent Executrix and as Co-Trustee of the Estate of William W. Browning, Jr.; Michael G. Starnes, Individually, as Co-Independent Executor and as Co-Trustee of the Estate of William W. Browning, Jr., as Co-Trustee of the Browning Children's Trusts, and as Special Trustee; Catherine Agnes Land Starnes; Kathryn Louise Browning Cook; Averille Adams Browning Dawson; William Webb Browning, III; Winifred Fallon Browning Vaughn; Robert Holland Browning; and NationsBank of Texas, N.A., f/k/a NCNB Texas National Bank, Successor to FDIC, as Receiver for First RepublicBank Dallas, N.A., Successor to InterFirst Bank Dallas, N.A., Individually and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased.

The Holloways' petition combined with Flojo's petition is their last gasp after 14 years of litigation with the Brownings. Over 15 separate but interrelated proceedings (lawsuits or original proceedings) have been filed, involving 16 separate appeals. This is the fourth time Holloway has sought to present essentially the same questions to this Court. Portions of the history of this litigation are reported in the opinions cited in the footnote.[2]

Due to the complex, lengthy history of this litigation, only an extremely abbreviated synopsis of the most important aspects can be provided. A flow chart is

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[2] *Flojo Trading Corp. v. Browning*, No. 3-91-256-CV (Tex. App. July 1, 1992) (unpublished); *Holloway v. Starnes*, 840 S.W.2d 14 (Tex. App. 1992, writ denied); *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App. 1989, writ denied); *Browning v. Ryan*, 756 S.W.2d 379 (Tex. App. 1988) (orig. proceeding), *rev'd*, *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989); *Jaehne v. Starnes*, No. 14,693 (Tex. App. Sept. 23, 1987) (unpublished); *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. 1984), *dism'l reinstated*, 690 S.W.2d 321 (Tex. App. 1985, writ ref'd n.r.e.) (*en banc*), *cert. denied*, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602 (1986); *Holloway v. Navarro*, No. 91-1541 (5th Cir. Jan. 3, 1992) (unpublished); *Browning v. Navarro*, 923 F.2d 377 (5th Cir. 1991) (*Browning v. Navarro IV*); *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989) (*Browning v. Navarro III*), *reh'g denied*, 894 F.2d 99 (5th Cir. 1990); *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987) (*Browning v. Navarro II*); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984) (*Browning v. Navarro I*), *rev'g Browning v. Navarro*, 37 B.R. 201 (N.D. Tex. 1983); *Holloway v. Walker*, 784 F.2d 1287 (5th Cir.), *reh'g denied*, 790 F.2d 1170, *cert. denied*, 479 U.S. 984, 107 S.Ct. 571, 93 L.Ed.2d 576 (1986); *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986) (Bolivian consul matter); *Holloway v. Walker*, 811 F.2d 263 (5th Cir. 1987) (sanctions).

provided in Appendix A at 1a-4a to assist the Court in relating the various proceedings to each other.

This litigation began in 1979 when the Brownings sued Holloway, Robbie, Humble Exploration Company, Inc. ("Humble," now known as HECI Exploration Co.), and others for fraud and breach of fiduciary duty obligations (the "1979 Case"). (App. A at 1a & 4a, see A.1; the 1979 Case is identified on the flow chart by the letter "A.") Holloway filed bankruptcy proceedings for Humble, Robbie and himself and removed the 1979 Case to the bankruptcy court. (App. A at 1a & 4a, see B.1; Holloway's bankruptcy proceeding is identified on the flow chart by the letter "B.") The bankruptcy court subsequently remanded the case to the state court but retained jurisdiction for enforcement of any resulting judgment. Ultimately, after a lengthy jury trial, the Brownings obtained a judgment (the "1982 Judgment") awarding them damages, constructive trusts or both against Holloway, Robbie and Holloway's alter egos – Humble, Sterling, Holloway Exploration Corp. and Flojo. (App. A at 1a & 4a, see A.2.) All the parties against whom the 1982 Judgment issued appealed. (App. A at 1a & 4a, see A.3.)

Even prior to appealing the 1979 Case, Holloway, Humble and others also attacked the 1982 Judgment by filing in federal court a civil rights suit, *Holloway v. Walker*. (App. A at 1a & 4a, see C.1; *Holloway v. Walker* is identified on the flow chart by the letter "C.") In *Holloway v. Walker*, Holloway alleged that Judge Walker had corruptly conspired with the Brownings, their attorneys and others to deny the defendants in the 1979 Case a fair trial to obtain control of their property. Holloway sought damages under 42 U.S.C. § 1983 and a declaratory judgment holding the 1982 Judgment void for denying them due process under the Fourteenth Amendment. They also

alleged pendent state law claims of wrongful receivership and negligence and malfeasance by the receiver.

Holloway also converted his bankruptcy to a liquidation proceeding. (App. A at 1a & 4a, see B.2.) Don Navarro was appointed trustee of Holloway's bankruptcy estate and Humble's bankruptcy estate. Because no supersedeas bond was filed, the Brownings filed *Browning v. Navarro* in the federal district court under its bankruptcy jurisdiction to enforce the constructive trust portions of the 1982 Judgment. (App. A at 2a & 4a, see D.1; *Browning v. Navarro* is identified on the flow chart by the letter "D.") In response, Holloway, Robbie, Navarro, Humble and Sterling all challenged the 1982 Judgment as void. The federal district court held that the 1982 Judgment was void because Judge Walker lacked jurisdiction under the bankruptcy court's remand order. *Browning v. Navarro*, 37 B.R. at 210. (App. A at 2a & 4a, see D.2.)

The Brownings moved to dismiss the appeal in the 1979 Case due to the appellants' inconsistent claims in the federal court; the appellants requested that the appeal be abated until the Fifth Circuit's decision. In *Humble Exploration Co. v. Browning*, 677 S.W.2d at 113, the court of appeals held that the appellate record showed that the appellants had not objected to Judge Walker's trying the case on any alleged restrictions from the bankruptcy court. It found that the appellants had gambled on the verdict in the trial before Judge Walker and then having lost, pursued their appeal, while at the same time advancing their "leash"[3] theory in the federal courts. *Id.* at

---

[3] In oral argument, appellants' counsel told the court of appeals that the bankruptcy court's remand order was like "a 'remand on a leash' whereby the Bankruptcy Court could, at any time, grasp the leash and return the dispute to that court regardless of its status in the state system." 677 S.W.2d at 113, n.3.

113-14. The court of appeals held that the appellants had trifled with the state courts and dismissed their appeal. *Id.* at 114-15. (App. A at 1a & 4a, see A.4.)

A few months later the Fifth Circuit reversed the federal district court's judgment, holding that Judge Walker had jurisdiction in the 1979 Case and that the 1982 Judgment was not void. *Browning v. Navarro I*, 743 F.2d at 1086. (App. A at 2a & 4a, see D.3.)

Following *Browning v. Navarro I*, the state appellants filed in the court of appeals their "Motion to Withdraw Judgment Granting Appellees' Motion to Dismiss." The court of appeals initially granted the motion *ex parte*. Five months later the *en banc* court reinstated the dismissal, holding that the appellants' motion had been wrongfully and purposely denominated to obtain a second motion for rehearing in violation of the Texas rules. *Humble Exploration Co. v. Browning*, 690 S.W.2d at 323, 328. Both the Texas Supreme Court and this Court refused to review the case. (App. A at 1a & 4a, see A.6-9.) *Humble Exploration Co. v. Browning*, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602, *reh'g denied*, 475 U.S. 1151, 106 S.Ct. 1807, 90 L.Ed.2d 351 (1986).

Meanwhile, on March 28, 1985 the federal district court granted the Brownings a partial summary judgment in *Holloway v. Walker*, holding that there was no evidence that the Brownings had conspired to deprive Holloway and the others of a fair trial in the 1979 Case. Several weeks later it held that Holloway had not been denied due process in the 1979 Case and dismissed the federal claims with prejudice. (App. A at 1a & 4a, see C.2.) It also dismissed without prejudice Holloway's pendent state negligent and wrongful receivership claims.

Following the dismissal of *Holloway v. Walker*, Holloway and Navarro refiled in the state district courts of Lee

County, Texas the state negligent and wrongful receivership claims in *Navarro v. Starnes*. (App. A at 2a & 4a, see G.1; *Navarro v. Starnes* is identified on the flow chart by the letter "G.")

Concurrently, the federal district court rejected Holloway's and Navarro's further attacks on the 1982 Judgment in *Browning v. Navarro I* and granted the Brownings immediate possession of the constructive trust property. (App. A at 2a & 4a, see D.4.) The federal courts issued a series of orders requiring Navarro, Holloway and Robbie to turn over constructive trust properties to Michael G. Starnes, as Special Trustee.

Attempting to block the federal court's enforcement orders, the appellants in the 1979 Case unsuccessfully sought extraordinary writs in the Texas appellate courts to prohibit enforcement of the 1982 Judgment. When those efforts failed, Holloway (without Navarro's approval), Flojo and other cohorts filed *Jaehne v. Starnes*, another collateral attack on the 1982 Judgment in the district courts of Lee County, Texas just minutes after filing *Navarro v. Starnes*. (App. A at 2a & 4a, see H.1; *Jaehne v. Starnes* and its companion case, *Holloway v. Browning* are identified on the flow chart by the letter "H.") Holloway obtained an *ex parte* temporary restraining order and multiple extensions prohibiting compliance with the federal district court's orders in *Browning v. Navarro*. Because Holloway had not obtained his approval, Navarro removed *Jaehne v. Starnes* to the bankruptcy courts. Holloway immediately refiled the collateral attack in the same court as *Marcy Holloway, et al. v. Jane H. Browning, et al.* (The Lee County collateral attacks were generally treated together and were eventually consolidated.)

When the Lee County collateral attacks were removed to the bankruptcy court, the federal district

court found that Holloway and his cohorts – some of whom were not parties to either the 1979 Case or *Browning v. Navarro* – had included numerous claims not within the ambit of *Browning v. Navarro*.[4] The court noted that such parties were claiming that they had superior title to property purportedly subject to the Brownings' constructive trust. The federal district court held that its order did decide superiorities of title between the parties to *Browning v. Navarro* and third persons. It further held that Holloway could dispute whether certain property came within the ambit of the constructive trusts ***"for reasons other than the validity of the state court judgment. . . ."*** (Holloway App. ("H.App.") I at 57a, emphasis added.) Accordingly, the federal district court abstained from resolving conflicting claims to title to assets subject to a constructive trust by the 1982 Judgment for reasons not involved in *Browning v. Navarro*. (*Id.* at 57a-58a.) The Lee County collateral attack cases were remanded to Texas courts.[5]

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[4] Holloway and his cohorts added a number of other claims such as libel, slander, and malicious prosecution to their collateral attacks in *Jaehne v. Starnes*.

[5] After the Lee County collateral attacks were remanded to the state courts, Judge Placke, who had issued the serial temporary restraining orders for Holloway, signed an order holding the 1982 Judgment void for an alleged litany of reasons. (App. A at 2a & 4a, see H.2.) The Texas Supreme Court stayed that order in an original mandamus proceeding, *Browning v. Placke* (which is identified on the flow chart by the letter "I"; App. A at 3a & 4a, see I.1). The Texas Supreme Court later held that the record did not show that the 1982 Judgment was void and issued a conditional writ of mandamus. *Browning v. Placke*, 698 S.W.2d at 363. (App. A at 3a & 4a, see I.2.)

Ultimately Holloway and his family nonsuited their attacks on the 1982 Judgment and many of their other claims in *Jaehne v. Starnes*. The Lee County district court granted the Brownings a

In compliance with the federal district court's orders, Navarro transferred to the Special Trustee title to various oil and gas interests and real property. Holloway, however, refused to vacate the Lee County Farm, one of the properties transferred to the Brownings. As a result, on December 23, 1985 the federal district court ordered Holloway and all those acting in concert with him to vacate the Lee County Farm. Holloway reported that he had moved off the farm but that his wife and daughters had not moved. Holloway then prepared and had filed in his *Holloway v. Walker* appeal an Emergency Application purportedly on behalf of his wife and daughters seeking a stay of the order requiring him to vacate the farm. (App. A at 1a & 4a, see C.3.) This ancillary application again attacked the 1982 Judgment as void and also threatened armed resistance to the Brownings' efforts to obtain possession of the farm. The Fifth Circuit denied the application on March 17, 1986. (App. A at 1a & 4a, see C.4.)

Two days later the Fifth Circuit affirmed the *Holloway v. Walker* judgment holding that the defendants in the 1979 Case had an adequate remedy in their direct appeal for alleged conspiracy between the Brownings, Judge Walker and others to deny them a fair trial in the 1979 Case. *Holloway v. Walker*, 784 F.2d at 1292. (App. A at 1a & 4a, see C.5.) The Fifth Circuit rejected Holloway's argument that the dismissal of the direct appeal denied an adequate post-judgment remedy. It specifically noted:

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summary judgment in April, 1991 on the remaining collateral attack on the 1982 Judgment by Flojo and the Jaehnes. (App. A at 3a & 4a, see H.7 & 8.) The Austin Court of Appeals affirmed that judgment on July 1, 1992; no further appeal was taken. (App. A at 3a & 4a, see H.10.) In the severed proceedings the district court granted the Brownings judgment against Holloway's remaining claims in January, 1992. (App. A at 4a, see H.9.) Holloway did not appeal.

> Plaintiffs' rights of state court review were lost by a unique, complex mix of events (which plaintiffs played a major part in creating).

784 F.2d at 1294. Holloway sought a writ of certiorari, which this Court denied. *Holloway v. Walker*, 479 U.S. 984, 107 S.Ct. 571, 93 L.Ed.2d 576 (1986). (App. A at 2a & 4a, see C.7.)

Meanwhile, on March 11, 1986 the federal district court, in *Browning v. Navarro*, held Holloway in contempt of court for moving back onto the Lee County Farm.[6] Holloway filed a petition for *habeas corpus* with the Fifth Circuit, again attacking the validity of the 1982 Judgment. (App. A at 2a & 4a, see E.1; the *habeas corpus* proceeding is identified on the flow chart by the letter "E.") He alleged that the 1982 Judgment was void because Judge Walker was biased, corrupt, had a personal interest in the case, and was represented by counsel against Holloway. He further alleged that Judge Walker imposed an illegal receivership on Humble to pay his own attorney. The Fifth Circuit denied the application. (App. A at 2a & 4a, see E.2.)

Undaunted by the numerous adverse decisions in the preceding several months, Holloway incorporated the same allegations and added new ones in three virtually identical attacks on the 1982 Judgment. The first was the Defendants' Motion for Summary Judgment and Declaratory Judgment in *Browning v. Navarro*. (App. A at 2a & 4a, see D.5.) The federal district court rejected Holloway's claims as no longer before it and issued a judgment disposing of the remaining issues in *Browning v. Navarro*. (App. A at 2a & 4a, see D.6.) Holloway, but not Robbie, appealed.

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[6] Prior to the contempt hearing, Holloway's wife and daughters vacated the Lee County Farm.

The very next week Holloway re-asserted the same claims in the bankruptcy court in objections to the Brownings' monetary claims against his bankruptcy estate. (App. A at 1a & 4a, see B.3.) Following a hearing, the bankruptcy court allowed the Brownings an unsecured claim of $72 million based on the 1982 Judgment and denied all of Holloway's objections to their claims. (App. A at 1a & 4a, see B.4.) Holloway appealed the bankruptcy court's order to the district court. (App. A at 1a & 4a, see B.5.)

A few weeks later, Holloway initiated the third, virtually identical, attack by filing this case. (App. A at 3a & 4a, see J.1; *Holloway v. Starnes* is identified on the flow chart by the letter "J.") Table I on page 11 compares Holloway's allegations in this case to the ones he made in *Browning v. Navarro* and in the bankruptcy case. The table compares the amended petition filed by Holloway on May 21, 1990, which was the most recent petition at the time the Brownings filed their Amended Motion for Summary Judgment.[7]

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[7] In the original petition, Holloway included an additional allegation that the Texas courts lacked jurisdiction over him because he had diplomatic immunity as a consul for the Republic of Bolivia. He had previously asserted the same claim in both the Lee County court and the federal courts. The federal courts rejected Holloway's contention, finding it to be both factually and legally lacking in merit. *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986). When the then sitting judge recused herself from this case, Holloway filed an amended petition, replacing his Bolivian consul argument with his claim that Judge Walker lacked jurisdiction because a previously appointed, retired judge had personal, exclusive jurisdiction over the case. Judge Ryan, a retired judge himself, granted Holloway a summary judgment on that issue while refusing to hear the Brownings' previously filed motion for summary judgment. (App. A at 3a & 4a, see J.2.) The Texas appellate courts reversed Judge Ryan's judgment and

TABLE I
COMPARISON OF HOLLOWAY'S CLAIMS IN MULTIPLE PROCEEDINGS

Holloway v. Starnes 1st Amd. Pet.		Browning v. Navarro May '86 MSJ	Bankruptcy Proceedings Obj. to Brownings' Claims
Para. No.	Allegation	Para. No.	Para. No.
1	Rule 301	14	5
2	Flojo Argument	17	6
3	Res Judicata	–	–
4	Stare decisis	–	–
5	Counsel in Case	10	15
6	Judge "Interested"	7 & 8	12 & 13
7	Judge Biased	6	11
8	Conspiracy	5	10
9	Appeal Dismissal	2	8
10	Supremacy Clause*	3	7
11	Denial of Jury and Due Process	4	14
12	Violation of State Statutes	11	16
13	Denied Access to Court	4	9
14	Unconstitutional Supersedeas	9	14
15	Fraud and Conspiracy	5 & 6	10 & 11
16	Penal Code	5-8	10-13
17	Unconstitutional	passim	10-13

* Holloway alleged the 1982 Judgment was obtained in violation of the bankruptcy court's order, and therefore the Supremacy Clause prohibits enforcement of the 1982 Judgment.

In Holloway's *Browning v. Navarro* appeal, the Fifth Circuit rejected all of his attacks on the 1982 Judgment except one. It held that Holloway could attack the 1982 Judgment as being procured by a fraud upon the court through a conspiracy between Judge Walker, the Brownings, their attorneys, and others. The Fifth Circuit cautioned, however, that Holloway's fraud claims could be barred by *res judicata*. *Browning v. Navarro II*, 826 F.2d at 346. (App. A at 2a & 4a, see D.7.) It held that if, on remand, Holloway proved fraud upon the court and *res judicata* did not bar his claim, the federal district court had the equitable power to set aside the entire 1982 Judgment, including the jury verdict. *Id.*

On remand the Brownings moved for summary judgment on the basis of *res judicata*. The federal district court vacillated but finally held that *res judicata* did not apply. It also denied Holloway's motion for summary judgment because fact questions existed. In addition it stayed Holloway's appeal from the bankruptcy court until *Browning v. Navarro* could be decided. (App. A at 1a & 4a, see B.6.)

The Brownings filed an interlocutory appeal to the Fifth Circuit. The Fifth Circuit held that *res judicata* barred any further attack on the 1982 Judgment for allegedly being obtained by a fraud upon the court through a conspiracy between Judge Walker, the Brownings, and their attorneys. *Browning v. Navarro III*, 887 F.2d at 558-62. Holloway also appealed, claiming that the 1982 Judgment was obtained by fraud, was in violation of the "clean-hands" doctrine and had been replaced by a subsequent judgment under the "last-in-time" rule. *Id.* at 556, 562-63.

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remanded the case. *Starnes v. Holloway*, 779 S.W.2d at 97-98. (App. A at 3a & 4a, see J.3 & 4.) Following remand, Holloway deleted that claim in the amended petition he filed on May 21, 1990.

The Fifth Circuit rejected all of Holloway's contentions and granted summary judgment for the Brownings. *Id.* at 564. (App. A at 2a & 4a, see D.8.)

When the Fifth Circuit ruled against Holloway in *Browning v. Navarro III*, Robbie, who had filed a separate appellee's brief against the Brownings, filed a motion for rehearing seeking to pursue Holloway's claims that the 1982 Judgment was fraudulently obtained by conspiracy. The Fifth Circuit denied Robbie's motion for rehearing, holding that she was bound by the May 23, 1986 revised final judgment, which she had not appealed. *Browning v. Navarro III* (rehearing), 894 F.2d at 100. (App. A at 2a & 4a, see D.9.)

On remand from *Browning v. Navarro III*, the federal district court issued its judgment holding that the 1982 Judgment " . . . is a valid and enforceable judgment." Because the court found that the Holloways had engaged in repetitious and frivolous litigation, it also enjoined them and all persons acting in concert with them from making any further attacks on the 1982 Judgment in the courts of the United States and from:

> attempting to relitigate [in any court] any claim . . . which [was] or could have been asserted in *Holloway v. Walker* (other than the pendent state claim action therein which was dismissed without prejudice), or in *Browning v. Navarro*. . . .

(App. A at 2a & 4a, see D.10.)

Holloway appealed yet again. A few weeks after the Texas district court granted the summary judgment in this case, the Fifth Circuit affirmed the federal district court's judgment. *Browning v. Navarro IV*, 923 F.2d at 377. (App. A at 2a & 4a, see D.11.)

After *Browning v. Navarro IV*, the federal district court, acting in its bankruptcy appellate role, affirmed the bankruptcy court's August 7, 1986 order allowing the

Brownings' claim and overruling all of Holloway's objections. (App. A at 1a & 4a, see B.7.) Holloway appealed that order to the Fifth Circuit. The Fifth Circuit affirmed and gave Holloway a final warning against further pursuit of his claims in the federal courts. *Holloway v. Navarro*, No. 91-1541 (5th Cir. 1992) (unpublished opinion), result published in table at 952 F.2d 399. (App. A at 1a & 4a, see B.8 & 9.)

The Brownings moved for summary judgment in this Case. Their major grounds against Holloway and Robbie were that their collateral attack was controlled by the recitations in the 1982 Judgment, that their bill of review was barred by the dismissal of the direct appeal, and that all their claims were barred by *res judicata*. The Texas district court granted the Brownings summary judgment without specifying the grounds. It also denied Holloway's motions for summary judgment, and enjoined Holloway, Robbie and those acting in concert with them from relitigating their attacks on the 1982 Judgment in the state courts.[8] (App. A at 3a & 4a, see J.5.)

The Holloways and Flojo appealed to the Dallas Court of Appeals. That court noted that the Holloways had not assigned any error to the dismissal of their collateral attack. It affirmed the judgment for the Brownings against the Holloways on the grounds of *res judicata*. It did not address the impact of the dismissal of the prior appeal. *Holloway v. Starnes*, 840 S.W.2d at 21-22.[9] (App. A

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[8] Although Holloway had previously filed eleven undecided motions for summary judgment, only one, his Amended Third Motion for Summary Judgment, was brought to the attention of the judge assigned to the case following remand.

[9] The Dallas Court of Appeals also addressed the Holloways' third motion for summary judgment. It held that even if the trial court had erroneously included Flojo in the 1982

at 3a & 4a, see J.6.) The Texas Superme Court denied review. (App. A at 3a & 4a, see J.7 & 8.)

REASONS FOR DENYING THE WRIT

I. Petitioners Did Not Properly Preserve the Federal Questions Sought to be Reviewed.

A. The Holloways Did Not Preserve Question No. 1 for Review.

The gist of the Holloways' first question presented for review is whether they were denied due process under the Fourteenth Amendment by an alleged conspiracy between Judge Walker, the Brownings and their attorneys in the original 1979 case to deny them a fair trial.

The Holloways claim that this question is raised by Holloway's first and sixth motions for summary judgment filed in 1986, which Robbie claims to have adopted. In fact, Holloway raised in the trial court only a part of the issue he presents here. His first motion for summary judgment claimed that Judge Walker's alleged interest in the case, acting as counsel for the Brownings, and bias or appearance of bias violated the due process provisions of the Texas Constitution but not the Fourteenth Amendment. (App. B at 5a-8a.) Holloway's Sixth Motion for Partial Summary Judgment claimed that Judge Walker allegedly acted as the Brownings' counsel, thereby violating the Due Process Clause of the Fourteenth Amendment. (App. C at 9a-10a.)

Neither of those motions was filed on Robbie's behalf. (App. B at 5a, App. C at 9a.) Contrary to the

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Judgment, such would not require reversal of that judgment against Holloway or Robbie. 840 S.W.2d at 24. Holloway and Robbie do not present a question on that matter for this Court's review.

Holloways' assertion, the index of the appellate record does not show that Robbie ever adopted either. (App. C at 13a-16a.) Therefore, she cannot rely on either motion to seek an affirmative judgment for her. *Central Education Agency v. Burke*, 711 S.W.2d 7, 8 (Tex. 1986); *Teer v. Duddlesten*, 664 S.W.2d 702, 703 (Tex. 1984).

Following the remand of this case by the court of appeals in 1990, Holloway filed Plaintiffs' Second Amended Original Petition, which alleged a "deprivation of due process under the Texas Constitution" but not the Fourteenth Amendment. In Texas practice an amended petition supersedes and supplants the instrument amended. *Johnson v. Coca-Cola Co.*, 727 S.W.2d 756, 758 (Tex. App. 1987, writ ref'd n.r.e.). The omission of a claim in an amended pleading is deemed an abandonment. *See Gage v. Langford*, 615 S.W.2d 934, 940 (Tex. Civ. App. 1981, writ ref'd n.r.e.).

In addition, Holloway did not argue any violation of the Fourteenth Amendment in his brief to the Texas court of appeals while arguing his assignments of error on the trial court's denying his first and sixth motions for summary judgment. (App. E at 24a-29a.) Texas procedure requires appropriate argument and authorities be presented to support each assignment of error. *Trinity Universal Ins. Co. v. Fidelity & Casualty Co. of N.Y.*, 837 S.W.2d 202, 205 (Tex. App. 1992, no writ). Finally, Holloway did not assign in his motion for rehearing to the court of appeals any error to that court's rejection of his assignments concerning his first and sixth motions for summary judgment. (App. G at 39a.) Under Texas procedure, a party cannot subsequently attack a ruling of a court of appeals which the party did not assign as error in a motion for rehearing to the court of appeals. *Albright v. City of Houston*, 677 S.W.2d 487, 488 (Tex. 1984).

B. The Petitioners Did Not Preserve Questions Nos. 2 and 3 for Review.

The Holloways' second and third points contend that the Texas courts somehow violated the Supremacy Clause by holding that their claims in this suit are barred by federal *res judicata* because the federal district court had dismissed without prejudice Holloway's pendent state law claims in *Holloway v. Walker* and had abstained in favor of the state courts in *Browning v. Navarro.*

The Holloways did not argue in their briefs to the Texas court of appeals that the trial court's granting summary judgment for the Brownings on *res judicata* grounds violated the Supremacy Clause of the United States Constitution. (App. E at 19a-23a and App. F at 34a-36a.) In fact, Robbie raised the Supremacy Clause for the first time in her reply brief to the Texas Supreme Court (App. J at 71a); Holloway raised it for the first time in his petition to this Court. (See App. G, H, I & K.) If the Supremacy Clause were an issue in this case, it would have been an issue when the trial court was addressing the Brownings' motion for summary judgment. Texas law requires a party to present an issue first to the lower courts for their decision in order to preserve it for appeal. Tex. R. App. P. 52(a); *San Jacinto River Auth. v. Duke,* 783 S.W.2d 209, 210 (Tex. 1990).

The Holloways failed to preserve any of their three questions for this Court's review. Rule 14.1(h), Supreme Court Rules.

II. The Court of Appeals Has Not Decided a Federal Question in Conflict with Decisions of this Court.

The Holloways cite various decisions of this Court that a decision without prejudice or an abstention is not a decision on the merits. Then they argue that the Texas

court of appeals acted contrary to these rulings by affirming the summary judgment in favor of the Brownings' grounds on federal *res judicata* grounds.

The Holloways mischaracterize the court of appeals' decision. Nowhere in its opinion did the court of appeals intimate that a dismissal without prejudice or an abstention was a decision on the merits. It merely decided that the issues presented by the Holloways in this suit were or could have been decided in either *Holloway v. Walker*, *Browning v. Navarro*, or Holloway's bankruptcy case.

The resolution of such a question has to be made by the courts in the subsequent cases. The court that resolves the first case does not know what issues will arise in subsequent cases. In fact, the Fifth Circuit in *Browning v. Navarro IV*, stated that the principles of claim and issue preclusion may bar particular claims or issues sought to be raised in the Holloway bill of review.

> Trusting in the state courts' competence, we leave to them the application of these principles and the decision whether our holdings in the many related cases involving these parties and this state court judgment bar any or all of the claims or issues raised in Mr. Holloway's pending state equitable bill of review.

923 F.2d at 377. The state courts' decisions applying those principles did not violate the Supremacy Clause or conflict with any decisions of this Court regarding federal *res judicata*.

III. The Holloways' Arguments Are Inconsistent.

The Holloways argue that the Texas courts violated the Supremacy Clause by barring their state law claims on the grounds of *res judicata*. Simultaneously they ask this Court to grant them judgment that the proceedings in the 1979 Case violated their due process rights under the

Fourteenth Amendment. In short, they urge federal claims on the merits while asserting that they are being denied a decision on state law claims.

The Holloways' due process issue here is the same issue Holloway asserted in *Holloway v. Walker* and in *Browning v. Navarro*. Both cases were decided adversely to Holloway on the merits. Variations of the same issue were submitted in Holloway's petition for certiorari in *Holloway v. Walker* (App. L at 77a-78a) and in the Holloways' petition for certiorari in the 1979 Case. (App. M at 80a.)

The Holloways quote out of context from *Browning v. Navarro II* to suggest that the Fifth Circuit has ruled that they were denied due process. They steadfastly ignore the Fifth Circuit's subsequent pronouncements in 1989 about this litigation.

> Plenty of process has been provided to the parties of this dispute. It is fair to say that seldom have so many judgments decided so little. We must decide whether any process is still due. We conclude that the litigants have had their day in court and that it is time to end this dispute.

Browning v. Navarro III, 887 F.2d at 554.

IV. The Holloways Impermissibly Ask This Court to Interpret Texas Law.

A bill of review[10] in Texas is an equitable procedure to set aside a prior judgment. It may not be used as a substitute for a direct appeal. *Clements v. Chajkowski*, 146 Tex. 408, 208 S.W.2d 841, 843 (1948). To obtain a bill of review in Texas a party must allege and prove: (1) a

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[10] The Holloways did not appeal the trial court's summary judgment on his collateral attack. *Holloway v. Starnes*, 840 S.W.2d at 18.

meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party, (3) unmixed with any fault of his own. *Petro-Chemical Transport, Inc. v. Carroll,* 514 S.W.2d 240, 243 (Tex. 1974).

In his appeal to the court of appeals, Holloway claimed that he was prevented from presenting his meritorious defenses at the trial of the 1979 Case by: (1) Judge Walker's alleged bias, fraud and conspiracy with the Brownings, their attorneys and others; and (2) Judge Walker's various unconstitutional and illegal rulings. 840 S.W.2d at 21. The court of appeals noted that Holloway had made or could have made the same factual allegations in the prior federal cases and this case "for one purpose – to have the [1982 Judgment] set aside as void or voidable." *Id.*

In *Browning v. Navarro* the Fifth Circuit held that Holloway could have the 1982 Judgment set aside by the federal courts if he showed that judgment was the result of collusion that (1) was designed to corruptly influence the proceedings or to inhibit the ability of an adverse party to fully present his defense, and (2) had the effect of foreclosing to him the opportunity to have a fair and complete trial. *Browning v. Navarro II,* 826 F.2d at 345; *Holloway v. Starnes,* 840 S.W.2d at 20. Holloway lost on the merits in *Browning v. Navarro* because his claims were barred by *res judicata* as a result of the prior judgment in *Holloway v. Walker. Browning v. Navarro III,* 887 F.2d at 558-62.

The court of appeals held that a party should not be permitted to relitigate in a Texas equitable bill of review the same fraud claims that he made unsuccessfully in prior attacks on the same judgment. 840 S.W.2d at 21. Robbie was likewise barred by *res judicata* because she

could have presented the same claims in *Browning v. Navarro*. (Robbie attempted to evade *res judicata* on the grounds that she had not appealed from the federal district court's judgment in May, 1986 and therefore was not bound by the rulings in *Browning v. Navarro II*, *Browning v. Navarro III* or *Browning v. Navarro IV*.) *Res judicata* bars claims that could have been decided, as well as those that were decided. 840 S.W.2d at 22; *Browning v. Navarro IV*, 923 F.2d at 377.

What a Texas court will consider to prove the second element of a Texas equitable bill of review is a matter of Texas law. The court of appeals' decision is evidently consistent with Texas jurisprudence because the Texas Supreme Court denied review. The Holloways essentialy ask this Court to tell the Texas courts what issues they should hear to support a unique Texas review procedure. Such action is not within the jurisdiction of this Court. 28 U.S.C. § 1257(a).[11]

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[11] The Holloways also, in essence, ask this Court to force the Texas courts to relitigate their claims of a violation of the due course of law provision of the Texas Constitution, because such provisions allegedly afford greater rights and impose higher standards than the Fourteenth Amendment. The Holloways' Texas constitutional claim was not the issue required to obtain a bill of review. They attempt to change the focus from the issues before the court of appeals. Moreover, their argument is erroneous. The Holloways fail to inform the Court that the Texas Constitution has two due course of law provisions, which provide separate due process and open court guarantees. *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984). None of the four cases cited by the Holloways establish that the due process provision of the Texas Constitution, Article I, § 19, would provide greater due process rights in the 1979 Case than does the Fourteenth Amendment. *Nelson v. Krusen*, 678 S.W.2d at 921; *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) and *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986) all address a separate issue of whether

V. The Federal Courts Did Not Leave Holloway's Claims for State Court Resolution.

Holloway's central argument in the Texas courts was that the federal court did not have jurisdiction to decide the bill of review claims because a bill of review had to be brought in the court that tried the original case. Robbie's main argument was that she was bound only by *Browning v. Navarro I*. When those arguments failed, they switched their arguments to variations of the ones presented here – that the federal courts preserved the Holloways' claims for state court review. They distort the actual proceedings in the federal courts.

Holloway's pendent state claims in *Holloway v. Walker* were for wrongful receivership in violation of certain Texas statutes and for negligence and malfeasance by the receiver. Holloway also sought a declaratory judgment that the 1982 Judgment was void for various reasons including the allegation that the civil rights defendants had deprived him of his constitutional rights to due process and a fair trial. The only reference to due process in the Plaintiffs' First Amended Complaint, however, was

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various legislative restrictions on litigants violate the Texas open courts provision, Article I, § 13 of the Texas Constitution. The fourth cite by the Holloways was to a concurring opinion by a justice of the Texas Supreme Court addressing a Texas procedural rule added five years after the trial in the 1979 Case. *Sun Exploration and Production Co. v. Jackson*, 783 S.W.2d 202, 205 (Tex. 1989) (Spears, J., concurring). (One justice joined in his opinion; two others disagreed in a separate concurring opinion; and the remaining five justices did not address the issue.) By rejecting the Holloways' arguments in this case, the Texas courts implicitly indicate that at least in the context of claims of this nature, the due process provisions of the Texas Constitution provide the same protection as the Fourteenth Amendment. Whether the Texas courts are correct in their interpretation of Texas law is not a matter for this Court.

to the Fourteenth Amendment. No claim of a violation of due process under the Texas Constitution was alleged in the Plaintiffs' First Amended Complaint. Therefore, no such claim was dismissed without prejudice. The attorneys who represented Holloway in *Holloway v. Walker* refiled his pendent state claims – wrongful receivership and negligence and malfeasance by the receiver – in *Navarro v. Starnes* just a few months after *Holloway v. Walker* was dismissed. *Navarro v. Starnes* concluded in December, 1991 when the Lee County district court rendered a summary judgment against Holloway, which he did not appeal.

Moreover, the issue in this case was whether Judge Walker had conspired with the Brownings and their attorney to prevent the Holloways from presenting their defenses in the trial of the 1979 Case. This was the same claim that the Fifth Circuit held Holloway could have and should have presented in *Holloway v. Walker*. *Browning v. Navarro III*, 887 F.2d at 558-62.

The Holloways next claim that *Browning v. Navarro* did not impart *res judicata* because the federal court twice abstained in favor of the Texas state courts and held that no state remedy was foreclosed by its rulings. The Holloways' argument is misleading. The federal court's abstention had nothing to do with this case or the claims which Holloway made a year later in *Browning v. Navarro*. Instead, the federal district court was deciding whether it should resolve the Lee County collateral attacks, *Jaehne v. Starnes* and *Holloway v. Browning*, which Holloway had filed to interfere with the federal district court's orders in *Browning v. Navarro*.

The federal district court found that *Jaehne v. Starnes* involved conflicting title issues and other issues that were largely local in character. The court further noted that persons who were not party to *Browning v. Navarro* were

claiming that they had superior title to property purportedly subject to the Brownings' constructive trust. The federal district court held that its order for Navarro to deliver property subject to the constructive trust to the Special Trustee did " . . . not foreclose any rights of any individuals ***not parties to this action*** who may assert ***superior title*** to or interest in any property." (H.App. I at 57a; emphasis added.) It provided further, "Likewise, if the Trustee or Holloway should subsequently discover any property which is, ***for reasons other than the validity of the state court judgment,*** rightfully that of the Estate or of the debtor, this order does not foreclose litigation to resolve that issue." (*Id.*, emphasis added.) Accordingly, the federal district court abstained from "the resolution of any issues regarding conflicting claims to title to assets subject to a constructive trust by the [1982 Judgment] on the basis of claims other than those adjudicated in this Court by parties to this action." (*Id.* at 57a-58a.) The Lee County cases were remanded to Texas courts. Thus, the federal district court's abstention order did not authorize the Holloways to pursue further litigation attacking the validity of the 1982 Judgment.

The Holloways also refer to the federal court's language in its June 28, 1985 order about not foreclosing any state court claims. That order dealt with the impact of prior rulings the federal district court had made on a contract argument raised by Holloway.

Approximately a year later, in his Motion for Summary Judgment and Declaratory Judgment, Holloway presented for the first time in *Browning v. Navarro* issues identical to those made in this case. The federal district court attempted to conclude *Browning v. Navarro* without addressing Holloway's claims. When Holloway appealed, however, the Fifth Circuit held that he was entitled to have his claims addressed. *Browning v. Navarro II*, 826

F.2d at 345-46. In *Browning v. Navarro III* the Fifth Circuit held that *res judicata* barred Holloway's claims. 887 F.2d at 558-62.

The federal courts did not authorize further attacks by the Holloways on the validity of the 1982 Judgment. To the contrary, in its final judgment the federal district court enjoined the Holloways from attempting to relitigate any issues that were or could have been determined in *Holloway v. Walker* or *Browning v. Navarro*. The only exception was the pendent state claims in *Holloway v. Walker* which were dismissed without prejudice. The Holloways' claims in this suit were not pendent claims in *Holloway v. Walker*. The Fifth Circuit affirmed that injunction. *Browning v. Navarro IV*, 923 F.2d at 377.

VI. The Holloways' Corruption Claims Are Part of Their Abusive Tactics.

The Holloways attempt to entice this Court into granting certiorari by suggesting this Court needs to act to preserve the integrity of the judicial process and therefore our very system of government.

This litigation has been so abusive because Holloway will and has adopted almost any tactic to win. He has not merely filed repetitious lawsuits hoping to relitigate adverse claims – he has filed multiple suits at the same time, attempting to play one court against the other.[12] He

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[12] Holloway filed the bankruptcy cases in 1979 for tactical reasons to interfere with the Brownings' litigation of the original suit in the state courts. When the original case was remanded to the state courts, he speculated on a trial before Judge Walker without objecting to his qualifications under the bankruptcy court's remand order. When he lost, he attacked the jurisdiction of the state courts on his "leash theory" while simultaneously asking the state appellate courts to reverse the

has used other persons, who were not involved in the original *Browning v. Holloway* litigation, as fronts to attack the 1982 Judgment against him.[13] He has threatened

---

judgment for him. *Humble Exploration Co. v. Browning*, 677 S.W.2d at 113. When the Fifth Circuit ruled against him in *Browning v. Navarro I*, he wrongfully and purposefully misdesignated a motion in the Texas court of appeals to seek a second rehearing in violation of the Texas Rules of Civil Procedure. *Humble Exploration Co. v. Browning*, 690 S.W.2d at 323.

When the federal district court issued orders in *Browning v. Navarro* to enforce the 1982 Judgment, he sought extraordinary writs from the Texas appellate courts to prohibit compliance with the federal district court's orders. When those courts denied such relief, he filed the Lee County cases to obtain a series of temporary restraining orders to prohibit compliance with the federal district court's order.

[13] Holloway used family members and other cohorts, who had not been parties in the 1979 Case to attack the 1982 Judgment in *Jaehne v. Starnes*, the Emergency Application to the Fifth Circuit in *Holloway v. Walker*, and a RICO suit, styled *Judge Gregory, et al. v. Judge Dee Brown Walker, et al.*, which Holloway as an attorney filed in the federal courts in 1984. (App. A at 2a & 4a; see F.1; *Gregory v. Walker* is identified on the flow chart by the letter "F.") That suit attacked the 1982 Judgment as being the product of Judge Walker's corrupt use of his office in conspiring with the Brownings, their attorneys and others in the 1979 Case. Neither Mr. Gregory, whose first name was "Judge," nor any of the other plaintiffs had been parties to the 1979 Case. They owned various mineral interests which they alleged were adversely affected by the 1982 Judgment. In discovery, the plaintiffs all stated that they had no knowledge to support any of their allegations. The person purportedly with knowledge was Holloway, whose knowledge was claimed to be privileged. *Gregory v. Walker* was dismissed with prejudice in 1985 for failure to comply with the federal district court's pretrial order. (App. A at 2a & 4a, see F.2.)

violence to prevent enforcement of the 1982 Judgment.[14] He has ignored the orders of the courts.[15]

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[14] In the Emergency Application Holloway prepared for the Fifth Circuit he stated that his wife and their daughters "have refused to leave their home, intending to defend it with all force necessary, and having armed themselves." Included in the allegations of irreparable injury was "the danger to the lives of the antagonists." Holloway has continued to threaten violence against even the judges who have been members of the courts which ruled against him in this case. (App. N at 82a-83a.)

[15] When the federal district court ordered Holloway and those in concert with him to vacate the Lee County Farm, he claimed the order did not apply to his wife, Brenda, or their daughters. Therefore, they did not leave. Holloway left, but returned three days later at the "invitation" of his wife. He contended that the federal district court did not order him to stay off the farm.

The federal district court found Holloway in contempt of court. It ordered him to pay the Brownings for the time he or his family occupied the farm in defiance of its order to vacate and imposed a fine to begin if Holloway did not vacate within ten days. Holloway vacated on the last day before having to pay the fine. He has never paid one cent of the amount the federal district court ordered him to pay the Brownings.

Because of the Holloways' vexatious and frivolous litigation, the federal district court permanently enjoined them from attacking the 1982 Judgment in the courts of the United States. Despite that injunction, in a subsequent appeal from the bankruptcy court before the Fifth Circuit, Holloway again attempted to attack the 1982 Judgment as void. Holloway's rationale was that by contending the 1982 Judgment was void, he was not attacking its validity as prohibited by the prior injunction. In a "final act of mercy" the Fifth Circuit did not sanction Holloway but warned him that any further actions in contravention of the finality of the federal litigation would expose him to the full panoply of sanctions available to the court, including imprisonment. *Holloway v. Navarro*, No. 91-1541, Op. at 3. (App. A at 1a & 4a; see B.8 & 9.) Now Holloway again attacks the validity of the 1982 Judgment in a court of the United States by his petition.

Attacking the integrity of judges is only one weapon in Holloway's arsenal of abusive tactics, which he is not shy about using. Holloway has a long history of attacking as corrupt judges who rule against him. After losing a state court case in the early 1970's, he filed a suit in federal court alleging that seven members of the Texas Supreme Court (several of whom later became judges on the Fifth Circuit) had corruptly ruled against his client. *Atchley v. Greenhill*, 373 F.Supp. 512 (S.D. Tex. 1974), *aff'd*, 517 F.2d 692 (5th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S.Ct. 1115, 47 L.Ed.2d 320 (1976). He has also claimed that Judge Irving Goldberg of the Fifth Circuit decided a case wrongfully as part of a personal vendetta against him. (1979 Case Recusal hearing, Vol. II: 31-32.) In the 1979 Case he claimed that the original trial judge, Judge Hugh Snodgrass, was corrupt. (1979 Case Recusal hearing, Vol. I: 332.) Throughout the 14 years of litigation with the Brownings, he has castigated the judges who have ruled against him in other courts. In the first appeal in this case he attempted to recuse the entire 13-member Dallas Court of Appeals as biased against him.

Holloway persists in these tactics to this day. Following the Texas Supreme Court's denial of his application for writ of error, Holloway was arrested on the affidavit of his own attorney for threatening the life of a justice of the Texas Supreme Court. A newspaper article reporting the arrest (App. N at 82a-83a) states that his attorney's affidavit

> quoted Holloway as saying that killing several judges "would teach the public that when the judiciary is corrupt and those members are killed, the public will be better off."

Austin American-Statesman, February 25, 1993, page B-3. The newspaper article reported further that the Texas Department of Public Safety had investigated Holloway in the summer of 1992 after he reportedly told a Dallas

attorney that Judge Enoch of the Dallas Court of Appeals should be killed. Judge Enoch was then the Chief Justice of the Dallas Court of Appeals, which had recently affirmed the judgment against them in this case. Holloway purportedly discussed how a person could spray the courtroom with automatic machine-gun fire. The first investigation was closed after he assured the police in a meeting at his attorney's office that he was not serious. Now, however, even his attorney acknowledged in his affidavit that "Holloway has arrived at the place where he must be taken very seriously." (App. N at 83a.)

CONCLUSION

In 1989 the Fifth Circuit concluded its *Browning v. Navarro III* opinion as follows:

> Justice Story once wrote "It is for the public interest and policy to make an end to litigation . . . [so that] suits may not be immortal, while men are mortal." *Ocean Insurance Co. v. Fields*, 18 F.Cas. 532 (C.D.D.Mass.1841) (No. 10,406). Little more need be said.

887 F.2d at 563-64. Earlier in the same year Justice Gonzalez of the Texas Supreme Court expressed his frustration with Holloway's perpetual tactics of initiating another lawsuit or appeal from every legal setback, "¡Ya basta!" Justice Gonzalez interpreted this as "Enough is enough." *Holloway v. Fifth Court of Appeals*, 767 S.W.2d at 685, 686 (Gonzalez, J. dissenting). (Justice Gonzalez dissented from that court's ruling that the court of appeals should not immediately end the litigation in the state courts by issuing a writ of prohibition.)

For these reasons, the Brownings respectfully request this Court to deny the Hollowways' petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

CHART OF *BROWNING v. HOLLOWAY* LITIGATION

LEGEND

A. Browning v. Holloway

1. Filed 9/12/79
2. Judgment 8/26/82
3. Appeal 11/24/82
4. App. Dism'd 7/11/84
5. Dism'l reinstated 3/26/85
6. NRE 7/3/85
7. Reh'g Den. 10/30/85
8. Cert. Den. 3/10/86
9. Reh'g Den. 4/28/86

B. Holloway Bankruptcy

1. Filed 11/19/79
2. Conv. to Chap. 7 10/1/82
3. PSH Objections 5/23/86
4. Bank. Ct. O/R PSH Objections 8/7/86
5. PSH Appeal 8/13/86
6. Stayed Pending BvN 8/29/88
7. Dist. Ct. Affirms 4/19/91
8. 5th Cir. Affirms 1/8/92
9. 5th Cir. Rev. Op. 1/27/92

C. Holloway v. Walker

1. Filed 11/18/82
2. Judgment 4/23/85
3. Emerg. Appl. 1/7/86
4. Emerg. Appl. Den. 3/17/86
5. 5th Cir. Affirms 3/19/86
6. Reh'g Den. 5/30/86

7. Cert. Den. 12/1/86
8. Sanctions 1/27/87

D. Browning v. Navarro

1. Filed 3/2/83
2. Judgment 1/17/84
3. BvN I 10/1/84
4. Part. Jdgmt 4/2/85
5. PSH MSJ & DJ 5/5/86
6. Judgment 5/23/86
7. BvN II 8/26/86
8. BvN III 10/23/89
9. 5th Cir. Reh'g Den. 1/26/90
10. Jdgmt w/Inj. 3/21/90
11. BvN IV 1/30/91

E. In Re: Holloway

1. Filed 3/14/86
2. Denied 3/17/86

F. Gregory v. Walker

1. Filed 5/25/84
2. Dismissed 7/12/85

G. Navarro v. Starnes

1. Filed 6/17/85
2. Judgment 12/9/91

H. Jaehne v. Starnes

1. Filed 6/17/85
2. Order 8/28/85
3. Vacated 10/31/85
4. Dismissed 1/10/86
5. Ct. App Op. 9/23/87

6. Writ Denied 5/11/80
7. Part. Jdgmt & Sev. 4/3/91
8. Am'd Par. Jdgmt & Sev. 4/18/91
9. Jdgmt. (sev. case) 1/6/92
10. Ct. App. Af'm 7/1/92

I. Browning v. Placke

1. Leave to File & Stay 8/28/85
2. Mandamus 10/30/85

J. Holloway v. Starnes

1. Filed 6/16/86
2. Ryan Jdgmt 4/13/88
3. Ct. App. Op. 8/15/89
4. Writ Den. 2/28/90
5. Judgment 1/10/91
6. Ct. App. Af'm 6/30/92
7. Writ Denied 2/10/93
8. Reh'g Den. 3/24/93
9. Pet. for Cert. 6/22/93

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

APPENDIX B

NO. 86-7044-I

PAT S. HOLLOWAY, *ET AL.*	§	IN THE DISTRICT
VS.	§	COURT OF
	§	DALLAS
MICHAEL G. STARNES, *ET AL.*	§	COUNTY, TEXAS
	§	162ND JUDICIAL
	§	DISTRICT

MOTION OF PLAINTIFF PAT S. HOLLOWAY AND INTERVENOR BRENDA HOLLOWAY FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Pat S. Holloway, Plaintiff on behalf of himself and Involuntary Plaintiffs Humble Exploration Company and Sterling Pipeline Company, and his wife Brenda Holloway, intervening herein as a co-plaintiff pursuant to Rule 60, Tex.R.Civ.P. (hereinafter collectively the "Holloways") and submit to the Court their Motion for Partial Summary Judgment pursuant to Rule 166-A, Tex.R.Civ.P.. In support thereof they respectfully show to the Court the following:

I.

THE JUDGMENTS HEREIN ARE VOID

The two purported final judgments dated November 11, 1982 and August 26, 1982 entered by this Court in Cause No. 82-5742-I and No. 79-9623-L, and asserted by Plaintiffs Browning Interests against the Holloways in

Plaintiffs' Second Amended Crossclaim filed July 28, 1986 in Cause No. 82-5742-I, are void as a matter of law and subject to collateral attack herein under the decision of the Supreme Court of Texas in *Browning v. Placke*, 698 S.W.2d 362 (1986) because Judge Walker had "no capacity to act as a court." 698 S.W.2d at 363. Judge Walker had no capacity to act as a court by reason of the following:

1. Judge Walker was "interested" in the case within the meaning of the prohibition contained in Section 11 of Article 5 of the Texas Constitution, and so was disqualified to render the judgments therein which are void. It has been settled Texas law for more than 125 years that any judgment rendered by a Texas judge in a case in which he is constitutionally disqualified is absolutely void and a nullity and so subject to collateral attack, and is not merely voidable and so subject to review only by bill of review. See e.g., *Buckholts Ind. School Dist. v. Glazer*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221-2 (1972); *Chambers v. Hodges*, 23 Tex. 104, 112-3 (1859).

2. Judge Walker acted in the capacity of "counsel" for the Browning Interests in the case within the meaning of the prohibition contained in Section 11 of Article 5 of the Texas Constitution, so that he lacked capacity to act also as the Court and his judgments are therefore void. As will be demonstrated by Defendants' brief to be submitted in support hereof, it is not necessary under the Texas cases, in order to violate the constitutional prohibition, that the judge have been counsel *of record* in the case but it suffices for disqualification if he performs *any acts appropriate to that of a counsel in the case.*

3. Judge Walker had no capacity to act as a court by reason of his bias or appearance of bias against Defendant Holloway and in favor of the Browning Interests. This deprived him of the capacity to act as a court and rendered his judgments void under Section 5 of Article 11 of the Texas Constitution as implemented by Canon 3C of the Texas Code of Judicial Conduct, TEX.REV.CIV. STAT.ANN. art. 320a, title 14, app. B (Vernon 1986). The Supreme Court of Texas has held that Canon 3(C)(1), which requires the judge to disqualify himself in any "proceeding in which his *impartiality might reasonably be questioned,* including . . . instances where (a) he has a personal bias or prejudice concerning a party," *implements* Section 11 of Article 5 of the Texas Constitution requiring disqualification and rendering judgments by disqualified judges void. *McLeod v. Harris,* 582 S.W.2d 772, 774 n.3 (Tex. 1979). The Texas Court of Criminal Appeals sitting *en banc* has held that the standard for determining bias for purposes of voiding judgments is that the "movant must show that if a reasonable man knew of all the circumstances, *he would harbor doubt about the judge's impartiality.*" *McLenan v. State,* 661 S.W.2d 108, 109 (Tex.Cr. 1983) (*en banc*). Any reasonable person who knew all the circumstances which are shown herein by the uncontrovertible record would at least *harbor a doubt* about Judge Walker's impartiality in the case, and so Movants are entitled to their partial summary judgment as a matter of law. On April 4, 1986, the United States Court of Appeals for the Fifth Circuit held void on collateral attack a Texas state court judgment which had been affirmed on appeal where there was a mere *appearance* of bias by the state court judge because in such a case, "in

the eyes of the public the impartiality of justice is shattered" regardless of actual bias. *Bradshaw v. McCotter*, 785 F.2d 1327, 1329 (5th Cir. 1986). And on April 22, 1986 the United States Supreme Court vacated a state court judgment because of the *appearance* of bias of a state court judge regardless of *actual* bias. *Aetna Life Insurance Company v. Lavoie*, ___ S.Ct. ___ (1986). A Judgment entered by a state court judge who is either biased or gives the appearance of bias is void not only under Section 5 of Article 11 of the Texas Construction, but also under Section 19 of Article 1 of the Texas Constitution, the Texas "Due Process" Clause.

* * *

APPENDIX C

No. 86-7704-I

PAT S. HOLLOWAY,	§	IN THE
ET AL.	§	DISTRICT COURT
	§	OF DALLAS
V.	§	COUNTY, TEXAS
MICHAEL G. STARNES,	§	162ND JUDICIAL
ET. AL.	§	DISTRICT

PLAINTIFFS' SIXTH MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs Pat S. Holloway and Brenda J. Holloway, on behalf of themselves and Humble Exploration Company, Inc. (now HECI Exploration Company) ("Humble") and Sterling Pipeline Company ("Sterling") and file this their sixth motion for partial summary judgment that the judgments entered by Judge Walker in *Browning v. Holloway* are void or voidable as a matter of law. In support thereof they respectfully show to the Court the following.

I.

This motion for partial summary judgment is based solely on the ground that Judge Dee Brown Walker acted as *counsel* or *attorney* in connection with the consolidated *Browning-Fairway* lawsuit. Consequently, his judgments entered in *Browning v. Holloway* are void or voidable by virtue of (1) Section 11 of Article V, and Sections 13, 19 and 29 of Article I, of the Texas Constitution, (2) the Due

Process Clause of the Fourteenth Amendment to the United States Constitution, (3) Article 15, *Tex.Civ.Stat.*, and (4) Canon 3(C)(1)(b) of the Texas Code of Judicial Conduct which has been held by the Supreme Court of Texas to implement the Texas Constitution. Attached hereto and made a part hereof in the Appendix hereto are official public documents, part of the record in the case. They evidence undeniable acts of Judge Walker as "counsel" which make his judgments void or voidable.

* * *

APPENDIX D

(Seal)

05-91-00571-CV
TRANSCRIPT

NO. 86-07704-I

VOLUME I

In the District Court, 162nd Judicial District Court of Texas, begun and holden within and for the County of Dallas and the State of Texas before the Honorable Judge thereof presiding.

PAT S. HOLLOWAY, ET AL — PLAINTIFF

VS.

MICHAEL G. STARNES, ET AL — DEFENDANT

APPEALED TO THE COURT OF APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT DALLAS.

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APRIL 5, 1991
APRIL 10, 1991

(3) $50.00 FILING FEES DUE

NO. 86-7704-I

PAT HOLLOWAY, ET AL	()	IN THE 162ND JUDICIAL
VS.	()	DISTRICT COURT OF
MICHAEL STARNES, ET AL	()	DALLAS COUNTY, TEXAS

* * *

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APPENDIX E

NO. 05-91-00571-CV

IN THE
COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

PAT S. HOLLOWAY — APPELLANT

v.

MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING VAUGHN — APPELLEES

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* * *

POINTS OF ERROR

Point of Error 1

The trial court erred by granting Appellees' Amended Motion for Summary Judgment. TR X: 2426-2428.

Point of Error 2

The trial court erred by denying Appellants' Amended Third Motion for Partial Summary Judgment. TR X: 2426-2428.

Point of Error 3

The trial court erred in denying Appellant's First Motion for Partial Summary Judgment because former Judge Dee Brown Walker was constitutionally disqualified by virtue of (1) his interest, (2) his acts as counsel in

the case and (3) his bias amounting to denial of state, as well as federal, due process. TR X: 2426-2428.

Point of Error 4

The trial court erred in denying Appellant's Sixth Motion for Partial Summary Judgment because Judge Walker engaged in acts as counsel in the browning [sic] case, so that his judgment is void. TR X: 2426-2428.

Point of Error 5

The trial court erred by denying Appellant's motion to supplement the summary judgment record with the findings of fact and conclusions of law entered by the Bankruptcy Court on the bankruptcy claim. TR X: 2425.

Point of Error 6

The trial court erred by permanently enjoining Appellant Pat S. Holloway from further litigation or challenge in the courts of this state to the validity of the judgment in the 1979 case. TR X: 2426-2428.

ARGUMENT

Point of Error 1

The trial court erred in granting Appellees' Amended Motion for Summary Judgment.

> The state court judgment, . . . , may involve more than $100,000,000, and we suppose, would pretty much wipe out Holloway if enforced. Yet

> for various reasons he has never had consideration, by either the federal or state courts, of the merits of his colorable claim that the state court judgment resulted from the corrupt abuse of the judicial process.

Browning v. Navarro, 826 F.2d 335, 337 (5th Cir. 1987) (*"Browning II"*). Four years after that analysis, it is still the case that Appellant Pat S. Holloway (hereinafter "Appellant" or "Holloway") has never had consideration of the merits of that colorable claim, now presented in the bill of review foreclosed by the trial court's judgment in this cause.

Whatever the merits of Appellees' underlying claim in the 1979 case, on which they received judgment in 1982, it defies equity and justice to grant that judgment repose when there exists an undetermined claim that the judgment was obtained through corrupt abuse of the judicial process which deprived Holloway of the opportunity to litigate on the merits. Holloway's present claim for equitable relief from that judgment, in the court which rendered that judgment, could not have been heard by any federal court, and the issues material to resolution of the bill of review have *never* been determined by any court in a manner essential to a final judgment. The trial court's conclusion that this bill of review was precluded by prior litigation is therefore erroneous.

* * *

Res Judicata Effect of Federal Litigation

The Supreme Court of Texas has determined that the res judicata effect of federal litigation on subsequent litigation in the courts of this State is governed by federal

rules for the application of res judicata. *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985). The Fifth Circuit has adopted the Restatement (Second) of Judgments as authoritative and controlling on questions of res judicata, *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983), thus the Restatement is the primary source of reference for resolution of the res judicata issues presented in this case by the related federal litigation between Holloway and Appellees. As an initial matter, there is no question that the claims for relief presented by Holloway in this bill of review arise out of the same common nucleus of operative fact as the claims and defenses asserted in the related federal litigation, such that in Restatement terms this case and the federal litigation involve the same transaction or cause of action. *See* JUDGMENTS 2d § 24.

The Restatement distinguishes between the issues of claim preclusion, more traditionally referred to as res judicata, and issue preclusion, a/k/a/ collateral estoppel. Compare JUDGMENTS 2d §§ 25 and 27. The two forms of preclusion have different rules for their application and different effects upon the case considered, and therefore require different perspectives of analysis in any one particular case.

A. Claim Preclusion

The general rule of claim preclusion is that all claims for relief based on the same cause of action must be brought at the same time, and those which are not brought at that time are subsequently barred by the judgment in the initial proceeding. JUDGMENTS 2d §§ 24, 25.

That rule is qualified, however, when there is some jurisdictional or procedural barrier to the assertion of all of the claims in the same proceeding; in that case the subsequent claims which could not have been brought in the initial proceeding are not barred by the judgment. JUDGMENTS 2d § 25, Comment (e); JUDGMENTS 2d § 26(1)(c) and Comment (c)(1) thereto. See also *Jeanes v. Henderson*, 688 S.W.2d at 104 ("Here, we must ascertain the consequences of the subsequent assertion of omitted state-related claims from a federal court action," and citing § 25, comment (e) of JUDGMENTS 2d).

In Texas, a bill of review is an equitable claim for relief which can only be brought in the court which rendered the judgment that the bill of review seeks to vacate. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). No other court, state or federal, can grant the relief requested by the bill except the court which rendered the judgment. It is thus apparent that the claim asserted by Holloway's petition for bill of review could not have been brought in any of the related federal litigation, and consequently the judgments in those proceedings cannot bar the bill of review.

It does not matter, as Appellees have urged, that the United States District Court, sitting in bankruptcy, could have granted relief in the civil rights case which would have provided a similar effect to that afforded by a bill of review; the Restatement speaks in terms of whether the *claim* which the moving party seeks to preclude *could* have been brought in the prior proceeding, not whether similar relief could have been afforded on a different claim which was or could have been brought. There are many reasons why a Federal court might decline to grant

relief on a properly presented federal claim to vacate a state judgment, but that Federal court has no authority, no jurisdiction, to act in any fashion on a state bill of review which also seeks to vacate that state judgment. The purpose behind the Restatement position on claim preclusion is to require a litigant to present all the claims which a particular court has the authority to decide, or else forego their subsequent assertion before a different tribunal. The Restatement does not require the useless act of presenting a claim without jurisdictional basis just so that particular court will determine that it does not have jurisdiction and dismiss the claim on that basis.

It is therefore of no moment that the Fifth Circuit determined that Holloway's federal bankruptcy defense to the enforceability of the judgment in the 1979 case could have been presented at the same time he filed his complaint in the civil rights case alleging a conspiracy to deprive him of his civil rights, so that the defense of fraud in the bankruptcy case was barred by the judgment in the civil rights case. Even if the bankruptcy defense would have afforded the same sort of relief in that case as a bill of review would afford in this case, the claim for relief carried by a bill of review could not have been presented and would not have been heard at that time, (TR VIII: 2078) and therefore it is not precluded by any of the judgments in the federal proceedings. To the extent the trial court's summary judgment relied upon any perceived claim preclusive effect of those proceedings, it is in error and should be reversed.

* * *

Point of Error 3

The trial court erred in denying Appellant's First Motion for Partial Summary Judgment because former Judge Dee Brown Walker was constitutionally disqualified by virtue of (1) his interest, (2) his acts as counsel in the case and (3) his bias amounting to denial of state, as well as federal, due process.

Point of Error 4

The trial court erred in denying Appellant's Sixth Motion for Partial Summary Judgment because Judge Walker engaged in acts as counsel in the browning [sic] **case, so that his judgment is void.**

Appellant's first and sixth motions for summary judgment asserted that the presiding judge of 162nd District was disqualified to hear the 1979 case due to (1) his pecuniary and personal interest in the case, (2) his acts as "counsel in the case" and (3) his bias, all in violation of Section 11 of Article V of the Texas Constitution as implemented by Canon 3(C)(1) of the Texas Code of Judicial Conduct as it existed in 1982, and the Due Process Clause of the Texas as well as of the federal, constitution. TR I: 10; II: 412. In support of these motions Holloway filed: (1) the depositions of Judge Walker and others taken in the civil rights case; (2) a verified transcript of an unlawful agreement between Judge Walker, Jane Browning, Michael Starnes, their Receiver and Robbie Holloway which was never made a part of the record in the 1979 case; (3) the official record in the 1979 case; and (4) ten supporting affidavits not controverted in any way by any of the Appellees, their attorneys, the receiver in the 1979 case,

or the receiver's attorney or accountant. These motions were denied by the trial court when it rendered summary judgment on Appellees' Amended Motion. TR X: 2427.

* * *

Discussion and Authorities

A. General Principles.

If Judge Walker was constitutionally disqualified, his judgment in the Browning Case was "absolutely void". *Fry v. Tucker,* 146 Tex. 18, 202 S.W.2d 218, 221 (1947); *Buckholtz Ind. School Dist. v. Glazer,* 632 S.W.2d 146, 148 (Tex. 1982). A judgment rendered by a disqualified judge is void and subject to collateral attack because he has "no capacity to act as a court." *Browning v. Placke,* 698 S.W.2d 362, 363 (Tex. 1985). It is "wholly unnecessary to appeal from a void judgment," because it "may be disregarded anywhere at any time". *Fulton v. Finch,* 162 Tex. 351, 346 S.W.2d 823, 827 (1961). Even a failure to attempt to appeal does not waive the disqualification issue. *Ex Parte Miller,* 696 S.W.2d 908, 910 (Tex. Cr. 1985) (en banc).

Therefore, all of the Brownings' arguments against the present suit based on the dismissal of the direct appeal from the Browning Judgment have no bearing on, or relevance to, this point of error asserting the disqualification of Judge Walker. Furthermore, any Browning argument based on the bill of review requirements of lack of fault or proof of a meritorious defense is entirely irrelevant to this point. *Boyd v. Gillman Film Corp.,* 447 S.W.2d 759, 763 (Tex. Civ. App. – 1969, writ ref'd n.r.e.); *Odom v. Odom,* 683 S.W.2d 135, 136 (Tex. App.-San Antonio 1984).

B. Disqualification for Interest.

"It is a settled principle of law that the interest which disqualifies is that interest, however small, which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge or court." *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1982); See *Sun Oil Company v. Whitaker*, 483 S.W.2d 808, 823 (Tex. 1972) ("pecuniary or personal interest"). Because Section 11 of Article 5 of the Texas Constitution disqualifies a judge from hearing any case in which he "may be interested," Texas courts have repeatedly held that if there be a doubt or question of a judge being "interested", that doubt or question should be resolved in favor of disqualification, as opposed to qualification, of the judge. See *Pahl v. Whatt*, 304 S.W.2d 250, 253 (Tex. Civ. App. – El Paso 1957); *Cotulla State Bank v. Herron*, 202 S.W. 797, 798 (Tex. Civ. App. – San Antonio 1917) (Fly, C.J.).

Judge Walker had an obvious personal and pecuniary interest in paying large sums of money out of the defendant Humble to his personal attorneys and personal accountant who had been, and were currently, performing free legal and accounting services for him. See *United States v. Tunnell*, 638, 67 F.2d 1182 (5th Cir. 1982), where the Fifth Circuit held that furnishing the free services of a prostitute to a Texas judge for favorable treatment constituted actual bribery under the Texas bribery statute requiring a "benefit" be conferred on the judge. Once Judge Walker had made these payments to his "free" personal attorneys and "free" accountant out of Humble through his unlawful receiverships, he had a further obvious personal and pecuniary interest in assuring that they not be required to disgorge the money they had

received by his unlawful orders. A Judgment against Holloway divesting him of his ownership of Humble was the only way to assure that result.

Judge Walker also had an undeniable personal and pecuniary interest in having the lawyer he personally hired in the 1979 case, former Judge Robert H. Hughes, paid out of the funds of the defendant Humble instead of out of his own personal funds. And once Judge Walker did this, he had an obvious personal and pecuniary interest in assuring that Holloway did not regain control of Humble so as to be in a position to seek reimbursement from Judge Walker. A judgment against Holloway divesting him of his ownership of Humble was the only way to assure that result.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, (1986), the Supreme Court held that the Due Process Clause of the 14th Amendment disqualified a state appellate justice, and rendered his court's judgment invalid, where he stood to benefit indirectly in a separate case of his own involving the same legal issue before his court. The financial benefit to Judge Walker was more direct, more substantial and more obvious than that involved in *Lavoie*. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 340 (1968), an arbitrator was held to be constitutionally disqualified because he had a "sporadic" and "irregular" business relationship with one of the parties from which he had derived a financial benefit, even though "there had been no dealings between them for about a year preceding the arbitration." 89 S.Ct. at 338.

In the present case the financially beneficial relationships between Judge Walker and his personal attorney Wright, whom Judge Walker made a party to the case, and his other personal attorneys Kelsoe and Sessions, were ongoing at the very time of trial. In the *Commonwealth* case the Supreme Court noted that there were no claim or evidence of actual bias, fraud or partiality. *Id.* at 339-40, 41. Here there is overwhelming evidence of actual bias and partiality, and indisputable evidence of a fraudulent agreement between Judge Walker and the Brownings. The present case is a much stronger case for disqualification than the Supreme Court held to be sufficient in *Commonwealth*.

In *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1110-12 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980), the Fifth Circuit held that a federal judge was disqualified because he was being represented at the time of trial in unrelated matters, "albeit nominally", by the attorney for one party, and also had a business relationship with that attorney. Here G.H. Kelsoe, the Appellees' chief counsel, the receiver John Wright and his attorney Whitley Sessions were all representing Judge Walker in other unrelated matters and had ongoing business and financial relationships with him. In *Potashnick* there was (1) no indication the attorney was working for the federal judge free of charge, (2) the federal judge had not appointed his personal lawyer as receiver, and (3) the federal judge had not ordered any payments by a party to his personal attorney. Yet the federal judge was still disqualified. *A fortiori*, then Judge Walker was disqualified to hear the 1979 case.

There is no doubt about Judge Walker's constitutional disqualification under the foregoing authorities, especially since any doubt regarding disqualification must be resolved in favor of disqualification to fully maintain the appearance of dispassionate impartiality. The trial court therefore erred by denying Holloway's (First) and Sixth Motions for Partial Summary Judgment, as is further demonstrated by the briefs of Robbie Holloway and Flojo Trading Corporation which Holloway adopts in further support hereof. The judgment of the trial court should therefore be reversed and judgment rendered for Appellant.

* * *

APPENDIX F

NO. 05-91-00571-CV

IN THE COURT OF APPEALS
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS
AT DALLAS

PAT S. HOLLOWAY, ET AL.,

Appellants,

VS.

MICHAEL G. STARNES, ET AL.,

Appellees.

BRIEF OF APPELLANT ROBBIE HOLLOWAY

ORAL ARGUMENT REQUESTED

Dated: June 10, 1991

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* * *

POINT OF ERROR NO. 1 (TR.X:2426-7)

BECAUSE ROBBIE HOLLOWAY WAS NOT A PARTY TO THE PRIOR PROCEEDINGS CLAIMED TO BAR THIS CASE, THE SUMMARY JUDGMENT AGAINST HER WAS ERRONEOUS.

POINT OF ERROR NO. 2 (TR.X:2427)

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' THIRD AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT ASSERTING THAT THE WALKER JUDGMENT IS VOID AS TO FLOJO TRADING CORPORATION, AND THE WALKER JUDGMENT BEING JOINT AND INDIVISIBLE IS VOID AS TO ALL PARTIES.

POINT OF ERROR NO. 3 (Tr.X:2427)

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' FIRST MOTION FOR SUMMARY JUDGMENT ASSERTING THAT THE WALKER JUDGMENT IS VOID BECAUSE OF THE CONSTITUTIONAL DISQUALIFICATION OF FORMER JUDGE DEE BROWN WALKER FOR INTERESTS, ACTS AS COUNSEL IN THE CASE AND BIAS.

POINT OF ERROR NO. 4 (TR.X:2427)

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' SIXTH MOTION FOR SUMMARY JUDGMENT ASSERTING THAT THE WALKER JUDGMENT WAS VOID BECAUSE OF JUDGE WALKER'S CONSTITUTIONAL DISQUALIFICATION FOR HIS ACTS IN THE NATURE OF COUNSEL IN THE CASE.

ARGUMENT

POINT OF ERROR NO. 1 (Restated)

BECAUSE ROBBIE HOLLOWAY WAS NOT A PARTY TO THE PRIOR PROCEEDINGS CLAIMED TO BAR THIS CASE, THE SUMMARY JUDGMENT AGAINST HER WAS ERRONEOUS

There is no basis in law for the ruling of the district court that the claims of Robbie in this case are barred by res judicata or collateral estoppel. As shown below, res judicata requires a prior proceeding involving the **same parties and the same cause of action.** Collateral estoppel applies only where the **same parties** have actually litigated the **same issue,** and it was **essential** to the prior judgment.

Robbie simply was not a party in most of the prior proceedings claimed to bar the present case. Further, the claims and issues she asserts in the present case were not actually litigated and could not have been litigated, in either of the two prior proceedings in which Robbie was a party, but which did not involve the same cause of action she asserts here.

Statement of Facts

The Brownings' claim that the dismissal without trial of the federal civil rights action of *Pat S. Holloway, et al. v. Dee Brown Walker, et al.* is a res judicata bar to this action. *Tr.IV:900 ¶ 8.* Robbie was not a party in *Holloway v. Walker,* filed in 1982 after Robbie's 1981 divorce from Pat.

* * *

The Brownings claim that the Fifth Circuit judgments in *Browning v. Navarro II* and *Browning v. Navarro III*, and the district court judgment entered after *Browning v. Navarro III*, all serve to bar the present action. *Tr.IV:900 ¶ 8, 900 ¶ C et seq.* Robbie was not a party to any of those judgments. The Fifth Circuit has ruled specifically that Robbie was not a party to its judgment in *Browning v. Navarro II* and so was not a party in that case at any time thereafter. *Browning v. Navarro III* on motion for rehearing, 894 F.2d 99, 100 (5th Cir. 1990)

Robbie **was** a party to *Browning v. Navarro I*, and so is bound by the Fifth Circuit judgment there that the Walker Judgment is not void for violation of either the automatic stay of the bankruptcy code or the condition of the federal remand of the Browning Case, requiring its trial before a retired or visiting judge. But Robbie is not attempting to relitigate here that **federal issue.** She concedes it is foreclosed by the Fifth Circuit judgment in *Browning v. Navarro I.* Robbie is asserting here claims under state law as to which the federal court in *Browning v. Navarro* twice *abstained* "in favor of the courts of the State of Texas," ruling expressly that "no state court remedies . . . have been foreclosed by this Court". *Tr.VIIII:2097.* Those federal abstention orders were irrevocable and unreviewable, and were entered in 1985 while Robbie was still a party in that case.

Res judicata applies to the *final* judgment in the prior case. *Restatement (Second) of Judgments § 17 (1982).* The final judgment in *Browning v. Navarro,* and so the only one entitled to **claim** preclusive, res judicata, effect, is the last judgment in that case. That is the January 30, 1991

judgment of the Fifth Circuit, rendered **after** the judgment appealed here. *Browning v. Navarro IV*, 923 F.2d 377 (5th Cir. 1991). That January 30, 1991 judgment of the Fifth Circuit adjudges that "nothing in the district court's judgment or in any of our prior opinions prejudices Mr. Holloway's right to seek an equitable bill of review," although "principles of claim and issue preclusion may bar particular claims or issues" which otherwise might be asserted here. *Id.*

* * *

Discussion of Facts and Authorities

The Fifth Circuit correctly quoted the federal rule of res judicata in *Browning v. Navarro III*, 887 F.2d 553, 558 (5th Cir. 1989):

> **In order for a judgment to serve as a bar to a subsequent action, four conditions must be met: "the parties must be identical in both suits,** the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a **final judgment on the merits, and the same cause of action must be involved in both cases.** (emphasis added)

The Texas rule of res judicata is as follows:

> When a prior judgment is offered in a subsequent suit in which there is **identity of parties, issues and subject matter,** such judgment is treated as an absolute bar to retrial of claims pertaining to the **same cause of action** on the theory that they have merged into the judgment."

Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984) (emphasis added).

Robbie is not precluded from maintaining this action under the federal rule of res judicata because she was not a party in the federal cases relied upon by the Brownings as a res judicata bar to the present action (other than the Fifth Circuit Judgment in *Browning v. Navarro I*, and Robbie concedes that she is precluded from re-litigating here the single **federal** issue adjudicated there). Because Robbie was not a party to any of the state actions which are relied on by the Brownings (other than the dismissed 1981 suit which clearly did not involve the same cause of action), she is not precluded by any state proceeding from maintaining the present action.

Collateral estoppel has no application because Robbie is not seeking to re-litigate here any **issues** actually litigated in any of the prior proceedings in which she was either a party or **a non-party**. *Bacon v. Jordan*, 763 S.W.2d 395, 396 (Tex. 1989); see *Jeanes v. Henderson*, 688 S.W.2d 100, 106 (Tex. 1985).

The issues of extrinsic fraud, collusion and conspiracy have never been actually litigated, either by Robbie or anyone else, in any court, state or federal. Similarly, the issue of Judge Walker's disqualification has not been actually litigated by Robbie or anyone else in any other court, state or federal. Although a motion to recuse was heard, and denied, in the original case, most of the acts relied on to disqualify Judge Walker occurred **after** the recusal hearing. Also, since the direct appeal was dismissed, even those acts committed by Judge Walker

before the recusal hearing which he did not conceal at the time have never been reviewed by an appellate court.

* * *

APPENDIX G

NO. 05-91-00571-CV

IN THE
COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

PAT S. HOLLOWAY

APPELLANT

v.

MICHAEL G. STARNES, Individually and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING VAUGHN

APPELLEES

(Filed July 15, 1992)

APPELLANT'S MOTION FOR REHEARING

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PAT S. HOLLOWAY

NO. 05-91-00571-CV

IN THE
COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

PAT S. HOLLOWAY,

APPELLANT

v.

MICHAEL G. STARNES, Individually and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H.

BROWNING, Individually and
as Co-Independent Executrix and
Co-Trustee of the ESTATE OF
WILLIAM W. BROWNING, JR.,
Deceased; INTERFIRST BANK
DALLAS, N.A., Individually and
as Co-Trustee of the ESTATE OF
WILLIAM W. BROWNING, JR.,
Deceased; CATHERINE AGNES LAND
STARNES; KATHRYN LOUISE BROWNING
COOK; AVERILLE ADAMS BROWNING;
WILLIAM WEBB BROWNING III;
ROBERT HOLLAND BROWNING;
and WINIFRED FALLON BROWNING VAUGHN,

APPELLEES

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Comes now Appellant PAT S. HOLLOWAY, by and through the undersigned attorneys of record, with this Motion for Rehearing from the judgment of the Court in this cause on June 30, 1992, by which he would show the Court as follows:

GROUND FOR REHEARING

This Court erred in its judgment that Appellant's bill of review is barred by res judicata.

a. Appellant's bill of review could not have been brought in any prior proceeding or action in the federal courts.

On original submission this Court held that Appellant's bill of review was precluded in this cause because Appellant "either made or could have made all of the claims that he now asserts in either the civil rights case or in the enforcement action." **Opinion on Original Submission, p. 15.** This holding conflicts with the applicable federal law which the Court must apply in this cause. **See** *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985).

In *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983), the Fifth Circuit substantially adopted **Restatement, Second, Judgments (1982)** ("Judgments 2d") as the law of that Circuit concerning the scope of a "claim" for purposes of application of the doctrine of res judicata. § 24, comment (a) of Judgments 2d indicates that a claim embraces "all remedial rights of the plaintiff against the defendant growing out of the relevant transaction" such that the claim is seen in factual terms and is therefore "coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff."

Generally the Restatement forbids the "splitting" of a claim, i.e. all theories and forms of relief arising from a single transaction must be presented in single cause or those not asserted are subsequently precluded. See Judgments 2d § 24(1). However, § 26(c) of Judgments 2d indicates that the general rule against splitting does not apply to a second action when

> The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms or relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; . . .

See and compare Comment (c)(1) to § 26 and Judgments 2d § 25, comment (e).

As this Court is aware, a bill of review such as Appellant's can only be brought in the court which rendered the judgment that the bill seeks to vacate. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). Indeed, the Fifth Circuit has recognized this requirement of Texas jurisprudence, noting that

> . . . The Restatement suggests that actions challenging prior judgments on the basis of fraud should be brought in the court where the judgment was entered. . . . *In Texas, this suggestion is mandatory. The only way to challenge a . . . judgment is to bring a "bill of review" in the original court.*

DuBroff v. DuBroff, 833 F.2d 557, 561 (5th Cir. 1987).

Since Appellant's bill of review is a remedy or form of relief which could not have been presented in either the civil rights case or the enforcement action in the federal courts, it is permissible according to the Restatement and the controlling Federal law for Appellant to seek that remedy and form of relief in this cause. The

Court should therefore grant rehearing and reverse and vacate its judgment on original submission.

b. The Federal court in both the civil rights case and in the enforcement action expressly reserved Appellant's right to seek State remedies in the State courts.

Judgments 2d § 26(1)(b) provides another exception to the general rule prohibiting the splitting of a cause of action when:

> The court in the first action has expressly reserved the plaintiff's right to maintain the second action[.] . . .

That exception should be applied by the Court in this cause because in both the civil rights case and in the enforcement action the Federal courts reserved Appellant's right to seek state remedies in the courts of the State of Texas.

The Civil Rights Case

Appellant's amended complaint in the civil rights case adopted the same factual basis alleged in support of his claim pursuant to 42 U.S.C. § 1983, invoked the pendent jurisdiction of the Federal court to consider his state law causes of action arising out of that common nucleus of operative facts, and prayed for declaratory judgment that the Walker judgment was void. Exhibit 89 to Brownings' Amended Motion for Summary Judgment, pp. 7, 59, 60 and 63. As this Court noted on original submission, that Federal court dismissed Appellant's pendent state

law claims *without prejudice* at the same time that the § 1983 claim was dismissed with prejudice for failure to state a cause of action. In that dismissal, Judge Sanders stated:

> Without expressing an opinion on the merits of the allegations in this case . . . [s]uch claims are better relegated to the normal corrective processes of the state courts. . . .
>
> The court is of the opinion that the viable pendent claims, if any, should be heard in the state courts. . . . No motions addressed to the substance of the pendent claims have been filed or considered by this Court. An adequate state forum is available. . . .
>
> . . . Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED WITH PREJUDICE; and Plaintiffs' pendent claims are DISMISSED WITHOUT PREJUDICE to the timely refiling of same in state court.

Exhibit 1 to Plaintiffs' Response to Brownings' Amended Motion for Summary Judgment, p. 7.

In considering a similar situation, and citing to Judgments 2d § 25, Comment (e), the Fifth Circuit stated in *Nilsen v. City of Moss Point* that:

> . . . the rule against splitting causes of action . . . "has no function if the procedural system does not permit the litigant to raise all of those claims in one proceeding." This is sound law. . . . Its soundness is borne out by the illustration given by the panel, that of the refusal of a federal court, in the exercise of its discretion, to exercise jurisdiction over pendent state law claims. Doubtless such claims

> . . . should be held not precluded. This is so because, under the procedural system of the forum, the magistrate either could not or need not have entertained them.

Nilsen, supra, 701 F.2d at 563 (citations omitted). In the terms of Judgments 2d, a dismissal of pendent state claims without prejudice is an express reservation of the right to maintain those claims in a subsequent action such that they will not be precluded if brought in that action. The Court should not, therefore, rely upon the dismissal of the civil rights case to support the Brownings' plea of res judicata in this cause.

The Enforcement Action

Following dismissal of the civil rights case, Judge Sanders was faced in the enforcement action with a state court collateral attack upon the Walker judgment brought by Appellant and others. In response, he entered two abstention orders, stating "[N]o state court remedies for . . . whatever theories may be devised have been foreclosed by this Court," (Exhibit 3 to Plaintiffs' Response to Brownings' Amended Motion for Summary Judgment, p. 4), and "[T]his Court will ABSTAIN in favor of the courts of the State of Texas from the resolution of any issues regarding . . . claims other than those adjudicated in this Court by parties to this action." Exhibit 4 to Plaintiffs' Response to Brownings' Amended Motion for Summary Judgment, pp. 2-3. Thus, again the Federal court expressly reserved Appellant's right to maintain a bill of review in this cause.

An identical issue confronted the Supreme Court in *Jeanes v. Henderson*:

> . . . Here, we must ascertain the consequences of the subsequent assertion of omitted state-related claims from a federal court action. Section 25, comment (e) of [Judgments 2d] instructs a state court to decide: (1) whether the federal court possessed jurisdiction over the omitted state claim, and if so, then (2) whether the federal court would clearly have declined the exercise of that jurisdiction as a matter of discretion. . . .

Jeanes, supra, 688 S.W.2d at 103. As pertinent, comment (e) to § 25 of Judgments 2d states:

> A given claim may find support in theories or grounds arising from both state and federal law. . . . If . . . , the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory of ground should be held not precluded. . . .

In light of this additional explicit reservation of Appellant's right to bring a state law claim for relief in a competent state court, there is no basis for the preclusion of the claim presented in this cause. The Court should therefore grant rehearing and reconsider its opinion on original submission.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant Pat S. Holloway respectfully prays the Court grant rehearing in this cause and upon reconsideration vacate its Judgment of June 30, 1992, and enter judgment as prayed for by Appellant on original submission.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT
PAT S. HOLLOWAY

APPENDIX H

NO._____

IN
THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

PAT S. HOLLOWAY — PETITIONER

v.

MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING VAUGHN

RESPONDENTS

APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS IN CAUSE NO.
05-91-00571-CV FIFTH SUPREME JUDICIAL DISTRICT

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ATTORNEYS FOR PETITIONER PAT S. HOLLOWAY

NO._____

IN
THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

PAT S. HOLLOWAY — PETITIONER

v.

MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING VAUGHN

RESPONDENTS

APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS IN CAUSE NO.
05-91-00571-CV FIFTH SUPREME JUDICIAL DISTRICT

TO THE SUPREME COURT OF TEXAS:

Now comes Petitioner PAT S. HOLLOWAY, by and through his counsel of record, with this Application for Writ of Error by which he would show the Court as follows:

STATEMENT OF THE CASE

Petitioner Pat S. Holloway ("Holloway") brought suit in Cause No. 86-07704-I seeking a bill of review from a judgment entered in 1982 by Judge Dee Brown Walker in *Jane H. Browning, et al, v. Pat S. Holloway, et al,* Cause No. 79-9623-L/I in the 162nd Judicial District Court of Dallas County ("the Walker Judgment"). On cross motions for summary judgment in this cause, the trial court granted judgment to Respondents and denied Holloway's motions; the Court of Appeals affirmed, holding that Holloway's cause was barred by the application of res judicata and that, therefore, there was no error in the denial of Holloway's motions which had alleged the voidness of the Walker judgment due to Judge Walker's disqualification.

The opinion of the Court of Appeals correctly states the nature and results of the case EXCEPT that the Court of Appeals does not accurately state the rationales of the

decisions of the Fifth Circuit in the related cases of *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987) ("Browning II") and *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989) ("Browning III"), and as a result the Court of Appeals overstates the holding of the Fifth Circuit in **Browning III** as " . . . res judicata preclude[s] Holloway's claims that the Walker judgment was procured by fraud." *Holloway v. Starnes*, ___ S.W.2d ___, No. 05-91-571-CV (Tex.App.-Dallas 6/30/92) (slip op. at p. 5). In fact, the Fifth Circuit's holding in **Browning III** is limited by its rationale and the rationale of Browning II such that the only Holloway claim of fraud which has been precluded by the Fifth Circuit is a claim which could only have been brought in a federal district court.

* * *

Thus, the primary question before the Court is whether Holloway's bill of review, based on uncontroverted and admitted allegations which affirmatively demonstrate that the Brownings obtained the Walker judgment through collusion and extrinsic fraud, can be barred by res judicata on the basis of judgments of a federal court which had absolutely no jurisdiction to hear a bill of review.

* * *

POINTS OF ERROR

POINT OF ERROR 1

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT FOR RESPONDENTS BY HOLDING THAT HOLLOWAY'S BILL OF REVIEW IS BARRED BY RES JUDICATA. (TR. X: pp. 2426-2428)

POINT OF ERROR 2

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF HOLLOWAY'S FIRST AND SIXTH MOTIONS FOR SUMMARY JUDGMENT. (TR. X: pp. 2426-2428)

ARGUMENT

POINT OF ERROR 1

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT FOR RESPONDENTS BY HOLDING THAT HOLLOWAY'S BILL OF REVIEW IS BARRED BY RES JUDICATA.

The ultimate decision of the Court of Appeals was to conclude "that Holloway's bill-of-review claims are barred by res judicata and, thus, cannot be asserted in an equitable bill of review." In doing so, the Court of Appeals failed to apply the federal law of res judicata to this cause to determine the preclusive effect of related federal judgments and, therefore, brought itself into conflict with this Court's decision in *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985). Additionally, by its erroneous application of res judicata the decision of the Court of Appeals also conflicts with this Court's decisions in

Browning v. Placke, 698 S.W.2d 362 (Tex. 1985), and *Middleton v. Murff,* 689 S.W.2d 212 (Tex. 1985).

The Court's failure is disturbing in light of its acknowledgement of the presumptive applicability to this cause of **Jeanes** and its further acknowledgement of the controlling principle of res judicata in the Fifth Circuit that "a claim is not barred by res judicata if it could not have been brought." *Browning v. Navarro,* 887 F.2d 553 (5th Cir. 1989) ("Browning III"). Where the Court of Appeals' analysis breaks down is in its overly simplistic conclusion that in the Fifth Circuit

> . . . Res Judicata, however, focuses on whether *claims* were or could have been brought in a prior action. The fact that the federal courts had no jurisdiction to hear Holloway's bill-of-review *proceeding* is irrelevant in determining whether his present *claims* were or could have been brought in a prior federal-court proceeding. If Holloway's present claims either were or could have been asserted in a prior proceeding, res judicata bars this bill of review. . . .

Holloway v. Starnes, ___ S.W.2d ___, No. 05-91-00571-CV (Tex. App.-Dallas 6/30/92) (slip op. at p. 10). This conclusion not only fails to properly comprehend and apply the relevant authority from the Fifth Circuit, it also misperceives the extent and character of the decisions in the Fifth Circuit which the Court of Appeals mistakenly read to require the application of res judicata in this cause.

In order to fully comprehend what the Fifth Circuit intended in **Browning III** when it held that Holloway could not, because of res judicata, advance any further claims for relief in that cause it is necessary to review the

Court's previous decision in that matter, *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987) ("Browning II"). As the Court of Appeals noted, the decisions in **Browning II** and **Browning III** involved an action by the Brownings in the Bankruptcy Court for the Northern District of Texas for the enforcement of the Walker judgment against the Bankruptcy estate of Holloway. In **Browning II** the Fifth Circuit was concerned with allegations raised by Holloway in a motion for summary judgment that the Walker judgment was void because of the actions of the Brownings, their attorneys, and Judge Walker during the trial of the underlying cause; the District Court had summarily dismissed Holloway's motion before any response by the Brownings.

The Fifth Circuit determined that *within the context of the proceeding to enforce the Walker judgment against the bankruptcy estate*, Holloway had one remaining defense which had not been previously determined in the action. That defense was that the judgment in question had been obtained through a corrupt abuse of the judicial process which had operated to deprive Holloway of an opportunity to fairly litigate the issues and which undermined faith in the validity of the jury verdict and resulting judgment. **Browning II**, 826 F.2d at 346. The Court also determined that, within the context of a proceeding to enforce a judgment against the bankruptcy estate, Holloway's ability to assert that defense might be foreclosed by res judicata. *Id.*

In **Browning III** the Fifth Circuit did hold that Holloway's defense to enforcement of the Walker judgment against the bankruptcy estate was barred by res judicata, but what is critical at this stage is that the basis of that

decision was that the Federal District Court which had heard Holloway's civil rights suit was fully competent and authorized to exercise jurisdiction in a bankruptcy matter and therefore to determine whether Holloway had a valid defense to the enforcement of the Walker judgment against his bankruptcy estate. **Browning III,** 887 F.2d at 558-560. In other words, it was the *proceeding* itself which was important to the Fifth Circuit, namely an adversary proceeding within a bankruptcy estate to determine the enforceability of a judgment against that estate, precisely because it was the nature of the proceeding itself which determined whether a particular court had jurisdiction to hear that proceeding and the requests for relief asserted therein. Contrary to the Court of Appeals' blithe dismissal of a lack of jurisdiction as irrelevant to the application of res judicata, the Fifth Circuit law of res judicata is premised upon the existence of subject matter jurisdiction over the claim for relief.

This is supported by the authorities cited by the Fifth Circuit in **Browning III** when it stated that,

> It is black letter law that a claim is not barred by res judicata if it could not have been brought. *If the court rendering judgment lacked subject-matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded.* **RESTATEMENT (SECOND) OF JUDGMENTS** § 26(1)(C). *See also* Nilsen, 701 F.2d at 562-63. . . .

Browning III, 887 F.2d at 558-559 (emphasis added). In *Nilsen v. City of Moss Point,* 701 F.2d 556 (5th Cir. 1983), as cited by the Fifth Circuit in **Browning III,** that Court stated that the rule against splitting a cause of action

> . . . "has no function if *the procedural system* does not permit the litigant to raise all of those claims in one proceeding." *Nilsen II/III*, 674 F.2d at 384 (emphasis added). This is sound law, and we do not gainsay it as a general proposition.

Nilsen, 701 F.2d at 562-563.

§ 26 of the **RESTATEMENT (SECOND) OF JUDGMENTS** ("Restatement"), as cited by the Fifth Circuit in **Browning III,** states:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) . . .
> (b) . . .
> (c) The plaintiff was unable to rely on a certain theory of the case *or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action,* and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; . . .

(emphasis added). The Commentary to § 26 of the *Restatement* states, as pertinent:

> *c. Where formal barriers existed against full presentation of claim in first action (Subsection (1)(c)).* The general rule of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a

litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

. . .

(l) Limitations on the jurisdiction of a system of courts. A given transaction may result in possible liability under the law of a state and alternatively under a federal statute enforceable exclusively in a federal court. When the plaintiff brings an action in the state court, and judgment is rendered for the defendant, the plaintiff is not barred from an action in the federal court in which he may press his claim against the same defendant under the federal statute. See Illustration 2. Compare § 25(1), Comment *e*.

Comment *e* to § 25 of the *Restatement*, with emphasis added, provides as follows:

e. State and federal theories or grounds. A given claim may find support in theories or ground arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. ***If however, the court in the first action***

> ***would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.***

The opinion of the Court of Appeals acknowledges that the federal courts had no jurisdiction to hear Holloway's bill of review, which if successful results not only in a vacation of the prior judgment but in a retrial as well of the initial, underlying cause of action. Indeed, there is no dispute that the only court which has authority to entertain and dispose of a bill of review is the same court which entered the judgment complained of in the bill. *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Middleton v. Murff*, 689 S.W.2d 212 (Tex. 1985). The decision of the Court of Appeals therefore conflicts not only with the mandate of this Court to apply federal res judicata principles to determine the preclusive effect of federal judgments, but also with this Court's long established jurisprudence that only one court has jurisdiction to hear a petition for bill of review. For those reasons alone, this Court should reverse the judgment of the Dallas Court of Appeals.

Additionally, the Court of Appeals erred in failing to properly apply federal principles of res judicata to the dismissal *without prejudice* of Holloway's pendent state claims in the civil rights action. As a general principal of federal res judicata, the dismissal of pendent state law claims without prejudice does not operate to preclude

reassertion of the claim in a court of competent jurisdiction. See, *Williams v. Dallas County Commissioners*, 689 F.2d 1212, 1215 (5th Cir. 1982) ("Accordingly, dismissal of Williams' . . . claims . . . is without prejudice and would not as a practical matter bar Williams from reasserting such claims . . . "); see also, *Matter of Hallahan*, 936 F.2d 1496, 1499, n. 2 (7th Cir. 1991) ("The case was dismissed without prejudice, and such a dismissal has no *res judicata* effect.")

This is especially so when the claims dismissed by the federal court are pendent state law claims. The exercise of pendent jurisdiction by a federal court is completely a matter of discretion, and to paraphrase Comment *e* to § 25 of the *Restatement*,: [sic]

> . . . . If however, the court in the first action, having jurisdiction to entertain the omitted theory or ground, would clearly have declined to exercise it as a matter of discretion, then a second action in a competent court presenting the omitted theory or ground should be held not precluded.

That, of course, is precisely what the federal court did in Holloway's civil rights case when it dismissed without prejudice Holloway's pendent state law claims which relied upon the same factual allegations made in support of his claim of a deprivation of civil rights and for which Holloway requested declaratory judgment that the Walker judgment was void. In fact, that same court, when called upon to consider the preclusive effect of its dismissal of the civil rights complaint, stated that,

> Furthermore, any state claims that Holloway might have brought in *Holloway v. Walker*

> would have been dismissed without prejudice as were the pendent state claims that he did present in that case.

Exhibit 102 in Support of Amended Motion of the Browning Interests, p. 8 (TR. V: p. 1257). There is, therefore, absolutely no basis to state, as has the Court of Appeals, that the dismissal of Holloway's civil rights complaint and the state claims pendent thereto has or should have any preclusive effect on this cause seeking a bill of review.

With that, any sound or rational basis for the Court of Appeals' reliance on the Fifth Circuit's ruling that Holloway's fraud claim in the enforcement action was barred by res judicata evaporates. It is, however, even more apparent that the Fifth Circuit's sole concern in **Browning II** and **Browning III** was with Holloway's claim for federal relief within the context of the proceeding in his bankruptcy estate to enforce the Walker judgment. The Fifth Circuit could not have contemplated that Holloway's state law remedies for the demonstrably corrupt fashion in which judgment against him was obtained were precluded by those decisions, since to do so would have been in conflict with the circuit's precedent that dismissals without prejudice do not have preclusive effect and that a judgment from a court which has no jurisdiction to consider a particular request for relief does not create a res judicata bar to the subsequent assertion of that request in a court of competent jurisdiction.

There is, then, no basis for the Court of Appeals' decision that Holloway's claim for a bill of review either was or could have been brought in the prior federal litigation. The trial court in the civil rights case expressly

declined to exercise pendent jurisdiction over any state law claim arising out of the Walker judgment, and the Fifth Circuit's application of res judicata in the enforcement action was based upon the availability of jurisdiction for the civil rights court to hear Holloway's request for relief provided by federal bankruptcy law. There was no jurisdiction available for the civil rights court to hear a bill of review premised on state law, including a retrial of the underlying cause, and as such Holloway's claim for relief in this cause could not have been heard at any time by any Federal court. The fact that Holloway's claim has not been heard on the merits has not changed since Judge Jolly's opinion in **Browning II,** wherein he stated:

> The state court judgment . . . may involve more than $100,000,000, and we suppose, would pretty much wipe our [sic] Holloway if enforced. *Yet for various reasons he has never had consideration, by either the federal or state courts, of the merits of his colorable claim that the state court judgment resulted from the corrupt abuse of the judicial process.*
>
> 826 F.2d at 337 (emphasis added). The judgment of the Court of Appeals that res judicata precludes the prosecution of Holloway's bill of review should therefore be reversed.

* * *

APPENDIX I

NO. D-2954

IN THE
SUPREME COURT OF TEXAS

PAT S. HOLLOWAY, et al.,

Petitioners,

v.

MICHAEL G. STARNES, et al.,

Respondents.

On Appeal from the Court of Appeals
for the Fifth Court of Appeals District
of Texas at Dallas, Texas

REPLY BRIEF OF PETITIONER
PAT S. HOLLOWAY

Dated: November 13, 1992

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ATTORNEYS FOR PETITIONER
PAT S. HOLLOWAY

NO. D-2954

IN THE
SUPREME COURT OF TEXAS

PAT S. HOLLOWAY, et al.,

Petitioners,

v.

MICHAEL G. STARNES, et al.,

Respondents.

REPLY BRIEF OF PETITIONER PAT S. HOLLOWAY

TO THE SUPREME COURT OF TEXAS: Petitioner Pat S. Holloway ("Holloway") files this brief in reply to the brief of Respondents Michael G. Starnes, et al. (the "Brownings"), respectfully showing to this Court as follows:

I. The Brownings Mischaracterize Holloway's Position On Res Judicata

On page 22 of the Brownings' brief they say:

> "Holloway's real argument is that *res judicata* does not apply to bill of review proceedings because they are unique to Texas law."

That is **not** Holloway's real argument at all. Of course res judicata applies to bill of review proceedings. A judgment in one bill of review would bar relitigation in a second bill of review of any claims that either were, or could have been, litigated in the first bill of review between the same parties.

But that is not the situation here. Here the federal litigation does not bar litigation of the claims under state law because the federal court (1) in *Holloway v. Walker* dismissed all of Holloway's claims based on Texas law expressly "without prejudice to the timely refiling of same in state court," and (2) in *Browning v. Navarro* "ABSTAINED in favor of the courts of the State of Texas" from deciding any claims of Holloway under Texas law, ruling specifically that "no state court remedies . . . have been foreclosed by this Court."

Because the federal court in both federal cases declined to exercise its discretionary jurisdiction over Holloway's claim insofar as it was based on Texas law, such claim based on Texas law is not barred by res judicata. This is because

> "[i]t is black letter law that a claim is not barred by res judicata if it could not have been brought. If the Court rendering judgment lacked subject

> matter jurisdiction over a claim, or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded. RESTATEMENT (SECOND) OF JUDGMENTS §26(1)(C) *See also Nilsen*, 701 F.2d at 562-63. . . .

Browning v. Navarro III, 887 F.2d at 558-9.

It is the Brownings, not the petitioners here, who are barred and precluded by res judicata (issue preclusion). "Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question." 18 Wright et al., Federal Practice and Procedure §4436, p.340 (1981). The federal court, in deciding not to exercise its discretionary jurisdiction over the state law claims presented here, determined with preclusive effect the specific issues that no "state court remedies have been foreclosed," that the state law claims "are better relegated to the normal corrective processes of the state courts", and "should be heard in the state courts" and that they were "dismissed without prejudice to the timely refiling thereof in state court". The Brownings are barred by issue preclusion from here asserting the opposite of those binding adjudications made by the federal court in ruling on the jurisdiction question.

II. The Brownings And The Court of Appeals Both Ignore The En Banc Ruling Of The Fifth Circuit In Nilsen v. City of Moss Point., Miss.

The facts of the present case are the precise illustration which the *en banc* Fifth Circuit used as an example of

a situation in which a cause of action or "claim" is not barred even though there is a prior judgment involving the same cause of action or "claim" arising out of the same transaction.

That is the situation presented here, where the federal court itself "split" the single claim or cause of action to set aside the Walker Judgment between its federal law grounds and its state law grounds. The federal court "split" the single cause of action by dismissing without prejudice all of Holloway's claims under Texas law in *Holloway v. Walker*, and by abstaining "in favor of the courts of the State of Texas" with respect to the issues under Texas law sought to be asserted in *Browning v. Navarro*.

In *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 562-3 (5th Cir. 1983) (en banc), the Fifth Circuit ruled that the dismissal of pendent state law claims from a civil rights action, the precise situation presented here does not bar the pendent state law claims. The Fifth Circuit stated:

> "[T]he rule against splitting causes of action . . . has no function if the procedural system does not permit the litigant to raise all of those claims in one proceeding [citation omitted] This is sound law. . . . Its soundness is borne out by the illustration given by the panel, that of the refusal of a federal court, in the exercise of its discretion, to exercise jurisdiction over pendent state law claims. Doubtless such claims . . . should be held not precluded. *Id.* This is so because, under the procedural system of the forum, the magistrate either could not or need not have entertained them. *Restatement (Second)*

> *of Judgments* §25, *Comment E.* **Put another way, the rule . . . precluding splitting causes has no function where the court itself, rather than the litigant, does the splitting. . . . "**

III. HOLLOWAY WAS NOT ALLOWED TO RAISE THE STATE LAW DISQUALIFICATION ISSUES IN THE FEDERAL COURT.

The Brownings continue to attempt to mislead the courts when they say on p.26 of their brief:

> "Holloway's pendent state claims in *Holloway v. Walker* were for wrongful receivership and malfeasance by the receiver – not the claims in this case."

The Brownings themselves contradict this erroneous statement when they say elsewhere in their brief:

> "In this case, Holloway not only could have raised the same issues in the federal courts, he did, in fact, raise the very same issues" (p.23).

> "They [Holloway and Robbie] now attempt to relitigate the exact same claims in this combined bill of review and collateral attack." (p.20)

> "Holloway made the same allegations about Judge Walker in *Holloway v. Walker,* contending that such alleged conduct denied him due process." (p.36).

The last statement comes closest to being accurate. Holloway contended that the conduct of Judge Walker denied him due process both under federal law and under state law. The federal court dismissed Holloway's federal due

process claims *with prejudice* as alleging only "procedural" rather than "substantive" due process violations; but it dismissed his state due process claim *without prejudice* to the refiling thereof in state court. This left Holloway's claim for violation of due process under the Texas Constitution free of any bar of res judicata, by virtue of the controlling federal authorities cited above.

In Holloway's amended complaint in *Holloway v. Walker* he "invoke[d] the pendent jurisdiction of this Court to consider [his] state law causes of action which arise out of the same common nucleus of operative facts that have given rise to [his federal §1983 claims]" *Brownings' Amended Motion for Summary Judgment, Vol. I, Ex. 89, P.7* ¶4. In Count Six of this amended complaint, Holloway expressly adopted the same factual allegations (para.1-153 of the complaint) as he had made under the federal §1983 claim in Count One. *Id.*, p.59, ¶185. Under both the federal law and the state law previously invoked, Holloway sought in such Count Six, and prayed for both there and at the end of his complaint, a declaratory judgment that the Walker Judgment was "void". *Id. at p.60, ¶192, and p.63, ¶2.*

In Browning v. Navarro, Judge Barefoot Sanders abstained "in favor of the courts of the State of Texas" when presented with a copy of the plaintiffs' petition in the Lee County collateral attack of *Jaehne, et al. v. Starnes, et al.*, which asserted the claim of Judge Walker's disqualification under the Texas Constitution, which petition has been removed to the federal court, but was then remanded to the state court.

The Holloways were thus precluded by the federal court itself from obtaining any determination of the disqualification issues in the federal courts. Now the court of appeals holds that the Holloways are barred from obtaining such determination in the state courts by the judgments in the federal court. This ruling serves to preserve what the Fifth Circuit characterized as the "corrupt abuse of the judicial process" established by the very same affidavits which neither any of the Brownings nor any of their attorneys have controverted in the present case (or in any other case). *See Browning v. Navarro II*, 826 F.2d 335, 345 (5th Cir. 1987).

* * *

APPENDIX J

NO. D-2954

IN THE
SUPREME COURT OF TEXAS

ROBBIE HOLLOWAY, *ET AL.*,

Petitioners,

v.

MICHAEL G. STARNES, *ET AL.*,

Respondents.

On Appeal from the Court of Appeals
for the Fifth Court of Appeals District
of Texas at Dallas, Texas

REPLY BRIEF OF PETITIONER
ROBBIE HOLLOWAY

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ATTORNEY FOR PETITIONER
ROBBIE HOLLOWAY

November 10, 1992

* * *

IX. FEDERAL *RES JUDICATA* DOES NOT BAR THIS BILL OF REVIEW/COLLATERAL ATTACK.

The Brownings' response does not confront or discuss any of the federal authorities cited or discussed in Robbie's application or, for that matter, those set forth in the applications of Flojo and Holloway. Those controlling authorities establish very clearly that the present action is not barred by *res judicata*.

As pointed out on p.6 of Robbie's application, and not rebutted in the Brownings' brief, the Dallas Court of Appeals has put the *res judicata* shoe on the wrong foot.

The adjudications by the federal court judgments that "no state court remedies have been foreclosed," that "the parties may proceed in a state court of competent jurisdiction" to litigate their conflicting ownership claims, that "an adequate state court forum is available," that the state law claims "are better relegated to the normal corrective processes of the state courts," "should be heard in the state courts" and are "dismissed without prejudice to the timely refiling of same in state court," are all entitled to preclusive *res judicata* effect in the Texas courts. *Stoll v. Gottlieb*, 305 U.S. 165, 170-1, 59 S.Ct. 134, 137 (1938).

When the federal court in its judgment has adjudicated that "no motions addressed to the substance of the pendent claims have been filed or considered by this Court [*Holloway v. Walker*], and that it "ABSTAINS in favor of the courts of the State of Texas" from adjudicating any state law claims or issues and that "no state court remedies have been foreclosed by this Court" [*Browning v. Navarro*], the state courts are precluded by *res judicata* (issue preclusion) from making a contrary ruling that the

state law claims were adjudicated on their merits in the federal courts, and so are barred and foreclosed.

Furthermore, even apart from principles of *res judicata* and full faith and credit, the Supremacy Clause of the United States Constitution also precludes the state courts from entering judgments in conflict with the above-quoted federal judgments. "Through the Supremacy Clause, Article III provides a sufficient basis for binding state courts." 18 Wright, Miller & Cooper, *Federal Practice & Procedure* §4468, p.649 (1981).

* * *

APPENDIX K

NO. D-2954

IN

THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

****

PAT S. HOLLOWAY, et al.,
PETITIONER

v.

MICHAEL G. STARNES, et al.,
RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS
IN CAUSE NO. 05-91-00571-CV
FIFTH SUPREME JUDICIAL DISTRICT

PETITIONER PAT S. HOLLOWAY'S MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

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NO. D-2954

IN

THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

****

PAT S. HOLLOWAY, et al.,
PETITIONER

v.

MICHAEL G. STARNES, et al.,
RESPONDENTS-

ON APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS
IN CAUSE NO. 05-91-00571-CV
FIFTH SUPREME JUDICIAL DISTRICT

PETITIONER PAT S. HOLLOWAY'S MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Comes now Petitioner Pat S. Holloway ("Holloway"), by and through his attorneys of record, with this Motion for Rehearing pursuant to Rule 190 of the Texas Rules of Appellate Procedure, by which he would show the Court as follows:

I.

The denial of Petitioner's Application for Writ of Error conflicts with this Court's opinion in *Jeanes v. Henderson*, (688 S.W. 2d 100), and endorses the Court of Appeals' failure to give federal res judicata effect to the dismissal without prejudice of his pendent state claims in the § 1983 action, specifically his request for judgment that the Walker judgment was void.

In *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985), this Court stated a requirement that the courts of this state must apply the federal law of res judicata to determine the preclusive effect, if any, of federal cases on the cases before them. A federal court's dismissal *without prejudice* of pendent state law claims over which it has discretionary jurisdiction does not raise a res judicata bar to their subsequent assertion in a state court of competent jurisdiction. *Williams v. Dallas County Commissioners*, 689 F.2d 1212 (5th Cir. 1982).

In the § 1983 action brought by Holloway against Respondents and Judge Dee Brown Walker Holloway invoked the court's pendent jurisdiction to hear state law claims and sought declaratory judgment that the Walker judgment was void. The federal district court, upon its determination that the complaint did not state a cognizable claim for federal relief, dismissed the pendent state claims without prejudice. In spite of that dismissal without prejudice, however, in this case the Dallas Court of Appeals held that Holloway could and should have raised his state claim for relief in the § 1983 action, and that this suit on a bill of review was therefore barred. This is an instance of the Court of Appeals' failure to comply with this Court's mandate in **Jeanes v. Henderson**

to give federal judgments federal res judicata effect. This Court should therefore grant rehearing and set Holloway's application for submission on the merits.

II.

The Court's denial of Petitioner's Application for Writ of Error also conflicts with this Court's opinion in *Jeanes v. Henderson*, and the opinion of the United States Court of Appeals for the Fifth Circuit in *Nilsen v. City of Moss Point*, (701 F.2d 556), in that the opinion of the Dallas Court of Appeals did not apply the federal law of res judicata in determining the preclusive effect of federal judgments.

The opinion of the Dallas Court of Appeals which affirmed the granting of summary judgment against Holloway's bill of review held, essentially, that Holloway could have presented his bill of review in earlier litigation between him and Respondents in the federal court system; based on that determination, the Court of Appeals then held that application of the principles of res judicata precluded further prosecution of the bill of review. In reaching its initial conclusion, the Court of Appeals should have applied the federal law of res judicata to determine the preclusive effect of the prior federal litigation, as this Court required in *Jeanes v. Henderson*, supra, 688 S.W.2d 100. The leading case of the Fifth Circuit concerning the application of res judicata is *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983), yet the Court of Appeals did not apply the principles set out in that opinion.

Citing **Nilsen** and the **RESTATEMENT (SECOND) OF JUDGMENTS**, the Fifth Circuit has held that, "It is

black letter law that a claim is not barred by res judicata if it could not have been brought." *Browning v. Navarro,* 887 F.2d 553 (5th Cir. 1989). There is simply no question that a bill of review pursuant to Texas law cannot be brought in any other court than the court which rendered the judgment challenged by the bill. SEE *Browning v. Placke,* 698 S.W.2d 362 (1985). There was never an opportunity for Holloway to ask the federal courts to hear this bill of review, and there has never existed a legitimate jurisdictional basis for those courts to determine the merits of the bill.

What the Fifth Circuit did say in **Browning v. Navarro,** supra, 887 F.2d 553, and *Browning v. Navarro,* 826 F.2d 335 (5th Cir. 1987), was that Holloway could have requested bankruptcy relief when he asserted his § 1983 claims against Respondents and Judge Dee Brown Walker. But that is not the question presented here or to the Dallas Court of Appeals; the only pertinent question here, as framed by the law of the Fifth Circuit on res judicata, is whether the bill of review could have been presented to those federal courts, i.e., did those courts have jurisdiction to hear a bill of review. The answer to that question is clearly no. The Court of Appeals erred in reaching a contrary result, and this Court should, on rehearing, grant Holloway's application and set it for submission on the merits to properly apply the federal law of res judicata and give the proper effect to the federal judgments.

APPENDIX L

No. 86-271

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 21, 1986

QUESTIONS PRESENTED

1. Where a state trial court has conspired with a litigant to deprive the opposing party of his property in a sham trial, does the availability of a postdeprivation

appeal render the Due Process Clause inapplicable and 42 U.S.C. § 1983 unavailable?

2. In declining to make a federal case of every tort by a state employee, has this Court *sub silentio* overruled a century of precedents holding that official abuse of state authority may violate due process whether or not the state's own system of remedies is constitutionally adequate?

PARTIES TO THE PROCEEDING

The abbreviated caption of this case omits several parties named as defendants in Petitioner Holloway's complaint who are Respondents here: Jane H. Browning, Michael G. Starnes, Catherine Agnes Land Starnes, Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, Robert Holland Browning and the Estate of William W. Browning, Jr. (the "Browning Interests"); G.H. Kelsoe, Jr. and R. Jack Ayres, Jr. (attorneys for the Browning Interests); John Wright (the receiver appointed by Judge Walker), Whitley R. Sessions, J.R. Hurt Fairway Land Co., Fayette Oil Co., AMCAP Petroleum Associates-1977, AMCAP Petroleum Associates-1979B, American Hawk Oil Co., American Falcon Oil Co., American Eagle Oil Co., American Heron Oil Co., American Wren Oil Co., American Raven Oil Co., Harper Oil Co., Jeffrey Weiss, Donald Ginsberg, and American Petroleum Partners.

APPENDIX M

NO. 85-1182

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HUMBLE EXPLORATION COMPANY, INC., et al.,
Petitioners,

v.

JANE H. BROWNING, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

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Incorporated
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Attorneys for Petitioners

December 24, 1985

I

QUESTIONS PRESENTED

1. Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterally attacking the validity of that judgment when Respondents sued to enforce it in federal court?

2. Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied by the Texas Court of Appeals' dismissal of Petitioners' appeal on a novel application of the doctrine of election of remedies announced for the first time in their case, which punished Petitioners for exercising their federal constitutional right to defend themselves in the federal court when sued there by Respondents?

3. Whether the Texas Court of Appeals could, without violating the Due Process Clause of the Fourteenth Amendment to the federal Constitution, force Petitioners, who were unable to supersede an $82 million state court judgment rendered against them and were sued in federal court by Respondents to enforce it, to choose between foregoing a defense related to the validity of that judgment or else forfeit their pending appeal.

LIST OF ALL PARTIES

1. Pat S. Holloway

2. Humble Exploration Company, Inc.

3. Sterling Pipeline Company

4. Flojo Trading Corporation

5. Holloway Exploration Corporation

6. Robbie Holloway

7. Jane H. Browning, Individually, and as Co-Independent Executrix of the Estate of William W. Browning, Jr.

8. Michael G. Starnes, Individually, and as Co-Independent Executor of the Estate of William W. Browning, Jr.

9. Kathryn Agnes Land Starnes

10. Kathryn Louise Browning Cook

11. Averille Adams Browning Dawson

12. William Webb Browning, III

13. Winifred Fallon Browning

14. Robert Holland Browning

APPENDIX N

(From the Austin American-Statesman, February 25, 1993, Page B-3)

"LAWYER IS ACCUSED OF THREATS"
"Austinite Holloway held on peace bond"

By Jim Phillips
American-Statesman Staff

An Austin lawyer was in jail in lieu of $1 million bond Wednesday after charges that he threatened to kill several appellate judges.

Pat Sterling Holloway, 61, was arrested late Tuesday at the law offices of Roy Minton, who represents Holloway in a pending civil case.

Holloway was arrested on a peace bond complaint that alleges "he is about to commit an offense against the person of Craig T. Enoch, to wit: murder." Enoch is a justice of the Texas Supreme Court.

The Department of Public Safety first investigated Holloway last summer after he reportedly told a Dallas attorney that Enoch should be killed, according to court affidavits. Enoch at the time was a judge on the 5th Court of Appeals in Dallas.

Holloway is appealing a $72 million judgment assessed against him in 1981. The appeals have been denied by the Dallas appeals court and the Texas Supreme Court.

An affidavit by a DPS lieutenant said that Holloway had discussed how a person could "spray the (Dallas) courtroom with automatic machine-gun fire (and lob) a

rocket through the court's window from the grassy knoll at Dealey Plaza."

The first investigation was closed after Holloway assured police in a meeting at Minton's office that he was not serious.

But Saturday, Holloway again threatened Enoch and other judges during a conversation with Minton about the Supreme Court ruling denying the appeal, according to an affidavit by Minton. In the affidavit, Minton quoted Holloway as saying that killing several judges "would teach the public that when the judiciary is corrupt and those members are killed, the public will be better off."

"It is my studied judgment that Mr. Holloway has arrived at the place where he must be taken very seriously," Minton said in the affidavit.

Supreme Court, U.S.
FILED
SEP 13 1993
OFFICE OF THE CLERK

No. 92-2048

IN THE
Supreme Court of the United States
October Term 1992

PAT S. HOLLOWAY, ROBBIE HOLLOWAY, AND FLOJO TRADING CORPORATION,
Petitioners,
v.
JANE H. BROWNING, MICHAEL G. STARNES, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To the Court of Appeals For the Fifth Judicial District of Texas at Dallas

REPLY OF PAT S. HOLLOWAY AND ROBBIE HOLLOWAY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-2048

IN THE

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October Term 1992

PAT S. HOLLOWAY, ROBBIE HOLLOWAY AND FLOJO TRADING CORPORATION,
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JANE H. BROWNING, MICHAEL G. STARNES, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To the Court of Appeals For the Fifth Judicial District of Texas at Dallas

REPLY OF PAT S. HOLLOWAY AND ROBBIE HOLLOWAY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15.6, Petitioners Pat S. Holloway ("Holloway") and Robbie Holloway ("Robbie") respectfully make this reply to the new arguments first raised in Respondents' Brief In Opposition in this cause to the Petition for Writ of Certiorari.

Respondents' brief does not cite or refer to *any* decision of this Court. Respondents' brief does not deny, or even address, any of the substantive facts presented in the Holloways' petition or in the petition of Flojo Trading Corporation in the companion Case No. 92-2049. Instead, Respondents misrepresent the record, the Texas law, and the

Holloway's position in order to argue both that they have not preserved their federal claims, and that no federal question is really involved.

REPLY

PETITIONERS PROPERLY PRESERVED THE FEDERAL ISSUES

A. *The Constitutional Issues of Judge Walker's Disqualification.*

Respondents wrongly claim (p. 15) that the Holloways have failed to preserve these issues. But they admit that Holloway's first motion for summary judgment asserted that Judge Walker's financial interest and bias violated the Due Process Clause of the Texas Constitution, and that his sixth motion for summary judgment asserted a violation of the Due Process Clause of the 14th Amendment. *P.15.*

Respondents point out that in Holloway's second amended petition he alleged only a "deprivation of due process under the Texas Constitution." That was because his (but not Robbie's) federal due process claim by then had been dismissed *with* prejudice in *Holloway v. Walker*, wherein his state claims were dismissed *without* prejudice.

Contrary to Respondents' argument, the record itself shows that Robbie adopted and urged these disqualification motions. She moved to strike portions of Judge Walker's affidavit filed by the Brownings in opposition to the first motion. *Tr. 693.* There she referred to Holloway's first motion, not as a motion by co-plaintiff Pat S. Holloway, but as "*Plaintiffs*' (First) Motion for Summary Judgment." *Tr. 693.* (emphasis added).

Robbie's First Amended Original Petition, never amended, superseded or abandoned, explicitly asserts that the Walker Judgment is void because Judge Walker's disqualification under "the Due Process Clause of the Texas Constitution and the United States Constitution." She further specifically alleged that Judge Walker was " 'interested in the outcome of the case' within the meaning of the Texas Constitution and the United Sates Constitution because of . . . "

Furthermore, Respondents fail to advise this Court that under Texas law and procedure it is actually immaterial that Robbie both pled the 14th Amendment and adopted and urged the disqualification motions for summary judgment in the district court in the present case. Even if she had not done so, she would have been entitled to assert the constitutional disqualification issue at any subsequent point in this litigation, because under Texas law such issues *cannot be waived*. A classical statement of the applicable Texas rule is contained in *Woodland v. State*, 178 S.W. 2d 528, 529-530 (Tex. Crim. App. 1944):

> Where a disqualification arises from a constitutional or statutory provision it cannot be waived even by consent of the parties litigant. *** The entire proceedings in No. 7144 were nullity and the judgment void and subject to collateral attack. *** The fact that appellant did not raise the question in the latter case, entered his plea of guilty and satisfied the judgment, and did not raise the question in the present case until presented in the motion for new trial did not preclude him from then raising it. To hold otherwise would in effect be to hold that he could waive the constitutional and statutory disqualification of the judge, which he can not do.

The Supreme Court of Texas recently has held again that "lack of jurisdiction is fundamental error and may be raised for the first time before this Court." *Mapco Inc. v. Carter*, 817 S.W. 2d 362, 363 (Tex. 1991). That court always has treated disqualification of the judge as one of the "jurisdictional deficiencies" that render a judgment void and subject to collateral attack. *E.g.*, *Browning v. Placke*, 698 S.W. 2d 362, 363 (Tex. 1985) ("no capacity to act as a court"); *Newcome v. Light*, 58 Tex 141 (1882); *Chambers v. Hodges*, 23 Tex. 105, 113 (1859).

A void judgment "may be disregarded anywhere at any time", *Fulton v. Finch*, 162 Tex. 351, 346 S.W. 2d 823, 827 (1961), "in any court." *Bender v. Damon*, 72 Tex. 93, 9 S.W. 747, 748 (1888). "Accordingly, disregard of the constitutional disqualification is error that can be raised at any point in the proceeding." *Bucholtz Ind. Sch. Dist. v. Glazer*, 362 S.W. 2d 146, 149 (Tex. 1982). Respondents' argument that Petitioner have waived and failed to preserve their disqualification issues is without merit, both factually and legally.

B. *The Federal Res Judicata Issues.*

Respondents wrongly assert (*p. 17*) that Petitioners have not preserved their issues 2 and 3 based on the federal law of res judicata, which both the Dallas Court of Appeals and Respondents have conceded is controlling. Petitioners have pled and argued in their briefs at every turn of the proceedings that the "federal law of res judicata" requires the state courts to honor the federal judgments which dismissed *without* prejudice all of Holloway's state claims and which "ABSTAIN(ED) in favor of the Courts of the State of Texas" from adjudicating any of the federal and state claims presented by Robbie Holloway in the present case.

The fact that Petitioners have not referred explicitly at every turn to the Supremacy Clause itself as the foundation of the "federal law of res judicata" cannot properly be construed to waive Petitioners' federal rights when this Court itself, while consistently requiring state courts to honor federal judgments, generally does not refer explicitly to the Supremacy Clause in its res judicata decisions (*see* cases cited on pp. 19, 20 and 24, and commentators cited in n. 6 on p. 18, of the Petition), and when only one concurring judge of the Third Circuit has found it appropriate to point out that the "ultimate source for binding state courts to federal decrees is the Supremacy Clause." *Delaware Citizens' Council v. Commonwealth of Pennsylvania*, 755 F. 2d 38, 46 (3rd Cir. 1985), *cert. denied*, 474 U.S. 819 (1985). *See Moore's Federal Practice* § 0.409 [1. -2], p. 311 (1992).

In the present case the Dallas Court of Appeals repeatedly cites, and treats as authoritative and controlling on the federal law of res judicata, the leading Fifth Circuit decision of *Nilsen v. City of Moss Point, Mississippi*, 701 F. 2d 556 (5th Cir. 1983) (*en banc*). But all the courts below studiously have ignored what *Nilsen* very plainly ruled about the precise fact situation presented in this litigation:

> The panel concluded that [] the rule against splitting causes of action..."has no function if the procedural system does not permit the litigant to raise all of those claims in one proceeding." (citations omitted). This is sound law...Its soundness is borne out of the illustration given by the panel, that of the refusal of a federal court, in the exercise of its discretion, to exercise jurisdiction over pendent state claims. Doubtless such claims...should be held not precluded. *Id*. This is so

> because, under the procedural system of the forum, the magistrate either could not or need not have entertained them. *Restatement (Second) of Judgments* §25, *Comment E.* Put another way, the rule against splitting causes has no function when the court itself, rather than the litigant, does the splitting..."

Nilsen, supra, at 562-3. That is the applicable controlling, and recurringly important, principle of the federal law of res judicata which all the state courts have ignored. This is the federal rule which Petitioners seek to have this Court uphold, while re-affirming that federal due process requires an unbiased and financially disinterested judge.

CONCLUSION

To maintain the fabric of an ordered society, it is essential that its judges, both trial and appellate, not only be financially disinterested, unbiased, fair and honest, but that the public perceive them to be so. It is surely fair to say that the present notorious litigation has done at least as mich as, if not more than, any other in the last decade to stain and unravel our fraying fabric, and lessen the public respect for our entire judicial system. The Court should grant the Petition and summarily reverse the courts below.

Respectfully submitted,

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